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Debt Collectors Allowed to Play Hide and Hope Nobody Seeks: *Midland Funding, LLC v. Johnson* and the Future of Chapter 13 Bankruptcy

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I. Introduction

Anna Jones, a hard-working mother of two, found herself with exorbitant medical and credit card bills after she was diagnosed with a rare type of lung cancer. After her recovery, Anna was left with an overwhelming amount of debt. To keep her house from being foreclosed upon after missing a few mortgage payments, Anna decided to file for Chapter 13 bankruptcy. Unfortunately, the Chapter 13 bankruptcy trustee happened to overlook a debt from four years prior that was also past the state's statute of limitations. When Anna made a payment on the stale debt, it brought life back into the dead claim. If Anna, the bankruptcy trustee, or an attorney had objected to the debt during the bankruptcy proceeding, the debt would have been gone forever since the statute of limitations makes it unenforceable. However, after the recent United States Supreme Court decision in *Midland Funding, LLC v. Johnson*,[1] people like Anna will forever be stuck with stale debts after a required payment is unwittingly made to rejuvenate them.

Before the Court's decision in *Midland Funding*, some jurisdictions utilized a simple solution for when a claim was filed based on a debt unenforceable due to the statute of limitations—a debtor could file a claim against a debt collector alleging a violation of the Federal Debt Collection Practices Act (FDCPA). In 1977, Congress passed the FDCPA[2] as part of the Consumer Credit Protection Act,[3] "to eliminate abusive debt collection practices by debt collectors" across the United States.[4] Under the FDCPA, a debt collector may not (1) "use unfair or unconscionable means to collect or attempt to collect any debt,"[5] (2) "use any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[6] or (3) "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[7]

The declaration of purpose of the FDCPA acknowledges the "abundant evidence of . . . abusive, deceptive, and unfair debt collection practices

1. 137 S. Ct. 1407 (2017).
2. Pub. L. 111-203, 124 Stat 2092 (2010) (codified at 15 U.S.C. §§ 1692-1692p).
3. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601-1665e (2012)).
4. 15 U.S.C. § 1692(e) (2012).
5. *Id.* § 1692f.
6. *Id.* § 1692e.
7. *Id.* § 1692d.

[performed] by many debt collectors,"[8] and states that the "[e]xisting laws and procedures [to correct] these injuries are inadequate to protect consumers."[9] These "[a]busive . . . practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[10] Congress recognized the unfairness inherent in the debt collection industry and passed the FDCPA to give consumers relief from many of the unscrupulous practices of debt collectors.

The FDCPA's teeth come in the form of injunctive relief and actual damages along with additional damages as the court may deem appropriate (but not to exceed $1000), the costs of the action, and attorney's fees for any successful action to enforce the Act.[11] The FDCPA has been referenced as a strict liability statute,[12] and a violation of any provision causes a debt collector to be liable under the Act. However, "[a] debt collector may not be held liable under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error."[13] The debt collector also must show it maintained procedures that were "reasonably adapted to avoid such an error."[14]

Anna Jones, and many other Americans just like her, must now take extra precautions when filing for Chapter 13 bankruptcy to avoid paying money to a debt collector who is not legally owed. This widespread issue will continue to plague the bankruptcy system since the Supreme Court has given debt collectors another avenue of securing payment on unenforceable claims in *Midland Funding*. This Note will discuss the history of bankruptcy and how the FDCPA interacts with those proceedings in Part II. Part III details the circuit split leading up to *Midland Funding*. Part IV takes a closer look at the case in question. Part V examines why the Supreme Court reached the wrong conclusion in *Midland Funding*, and what can be done about it. Part VI concludes this Note.

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8. *Id.* § 1692(a).
9. *Id.* § 1692(b).
10. *Id.* § 1692(a).
11. *Id.* §§ 1692k(a)(1)-(2)(A), (3). Conversely, the defendant (a debt collector) may only receive "attorney's fees [if the] action . . . was brought in bad faith and for the purpose of harassment." *Id.* § 1692k(a)(3).
12. *See* Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1175 (9th Cir. 2006).
13. *Id.* § 1692k(c).
14. *Id.*

II. History of Bankruptcy

Recently, there has been a rise in litigation involving the FDCPA in bankruptcy proceedings. To understand the conflict, it is important to understand the history, purpose, and realities of bankruptcy. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[15] For an individual contemplating filing for bankruptcy, the primary options are Chapter 7 or Chapter 13. Chapter 7 bankruptcy is also known as liquidation.[16] In a Chapter 7 proceeding, all of the individual's assets that are not exempt are sold to pay off the outstanding debts.[17] Chapter 7 bankruptcy is typically favored by individual debtors because it allows individuals to have their debts discharged at the conclusion of the liquidation[18] and ultimately is a quicker process. Although Chapter 7 bankruptcy remains the typical first choice for individual debtors, Congress recently enacted a "means test" individuals must pass to file for Chapter 7 bankruptcy. If the individual's income is over the stipulated amount on the test, he is unable to file for Chapter 7 bankruptcy[19] and must look to other options such as Chapter 13 bankruptcy.

Chapter 13 bankruptcy is titled "Adjustment of Debts of an Individual with Regular Income," but is typically referred to as a reorganization.[20] Chapter 13 is only for individuals with less "[t]han $394,725 of [u]nsecured [d]ebt or $1,184,200 of [s]ecured [d]ebt."[21] In a Chapter 13 proceeding, a payment plan is created that typically lasts three to five years depending on the filer's situation.[22] The plan "provide[s] for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."[23] The plan "may provide for less than full payment of all amounts owed for a claim entitled to priority . . . only if the plan provides that all of the debtor's projected disposable income for a 5-year period . . . will be applied to make

15. *In re* Dubois, 834 F.3d 526, 522 (4th Cir. 2016), *cert. denied sub nom.* Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017) (quoting Marrama v. Citizens Bank, 549 U.S. 365, 367 (2007)).

16. *See* 11 U.S.C. § 726 (2012).

17. *Id.* §§ 725-726.

18. *Id.* § 727.

19. *Id.* § 707.

20. *See id.* § 1322; *see also In re* Reg'l Bldg. Sys., Inc., 254 F.3d 528, 532 (4th Cir. 2001).

21. Cara O'Neill, *What Are the Differences Between Chapter 7 and Chapter 13 Bankruptcy?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-the-difference-between-chapter-7-chapter-13-bankrutpcy.html.

22. *Id.*

23. 11 U.S.C. § 1322(a)(1).

payments under the plan."[24] After the three- or five-year payment plan is complete, the bankruptcy proceeding discharges the remaining debt.

One advantage of Chapter 13 bankruptcy is that it benefits homeowners. If the individual filing bankruptcy is attempting to save a house from foreclosure, Chapter 13 might be the best option as liens can be stripped at the conclusion of the payment plan.[25] The drawback is that the individual must make monthly payments to the trustee for three to five years.[26] This is a difficult and lengthy process, and a recent study showed that less than half of those who filed under Chapter 13 ultimately made it through their plans and had their debts discharged.[27] The cases below focus on Chapter 13 bankruptcy and involve claims paid over a period of three to five years, as opposed to Chapter 7 proceedings which involve liquidating all assets to split the proceeds among creditors. This distinction becomes important when addressing the rights of creditors with claims that are unenforceable based on the statute of limitations in Chapter 13 bankruptcy.

Debt buying today has become a massive industry. In 2013, third-party debt collection agencies "recovered [approximately] $55.2 billion in total debt . . . earn[ing close to] $10.4 billion in commissions and fees."[28] In 2016, approximately $3.7 trillion of consumer credit was outstanding.[29] With these large amounts of outstanding debt, third-party debt collectors have an incentive to buy debt for a discount from companies who are not experienced in the debt collection process. The longer the debt remains outstanding, the larger the typical discount becomes on the old debt. Third-party debt collection agencies then purchase old debt for pennies on the dollar. Recognizing the realities of the debt buying process is important for a full understanding of the issue facing the courts.

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24. *Id.* § 1322(a)(4).

25. O'Neill, *supra* note 20.

26. *Id.*

27. Ed Flynn, *Success Rates in Chapter 13*, AM. BANKR. INST. J., Aug. 2017, at 38, 39, https://s3.amazonaws.com/abi-org-corp/journals/numbers_08-17.pdf.

28. ERNST & YOUNG, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE U.S. NATIONAL AND STATE ECONOMIES IN 2013, at 3 (2014), https://web.archive.org/web/20170518103428/http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf.

29. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT: MAY 2017 (2017), https://www.federalreserve.gov/releases/g19/20170710/g19.pdf.

III. Law Before the Case

In recent years, the circuit courts were tasked with deciding a series of cases after numerous lawsuits with similar facts were brought against debt collectors following a Chapter 13 bankruptcy. Courts across the nation were forced to determine whether the debt collectors' practice of filing proofs of claims that were unenforceable due to the applicable state's statute of limitations was a violation of the FDCPA. Under Chapter 13 bankruptcy, "[a] proof of claim may be filed by any entity that holds a claim against the debtor" for a consumer debt.[30] The Eleventh Circuit held this practice does violate the FDCPA,[31] while the Eighth,[32] Seventh,[33] and Fourth[34] Circuits refused to extend FDCPA claims to time-barred proofs of claim.[35]

A. The Eleventh Circuit Decided Filing a Time-Barred Claim Violated the FDCPA

In *Crawford v. LVNV Funding, LLC*, Stanley Crawford had filed for Chapter 13 bankruptcy in Alabama.[36] LVNV filed a proof of claim to collect on a debt it had purchased, even though the statute of limitations expired four years earlier.[37] The bankruptcy trustee paid on the claim, but four years later the debtor objected to the claim.[38] Crawford then filed a counterclaim alleging the practice violated the FDCPA.[39] The court in *Crawford* considered whether debtors can pursue FDCPA claims against creditors filing claims that are barred by the statute of limitations in Chapter 13 bankruptcy proceedings.[40] The Eleventh Circuit, the first circuit to consider

30. 11 U.S.C. § 1305(a)(2) (2012).

31. Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014). The Second Circuit similarly held that filing a proof of claim, even if invalid, is not a violation of the FDCPA. *See also* Simmons v. Roundup Funding, LLC, 622 F.3d 93, 94 (2d Cir. 2010).

32. Nelson v. Midland Credit Mgmt., Inc., 828 F.3d 749, 752 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).

33. Owens v. LVNV Funding, LLC, 832 F.3d 726, 736-37 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017).

34. *In re* Dubois, 834 F.3d 522, 5335 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).

35. Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014); Owens v. LVNV Funding, LLC, 832 F.3d 726, 736-37 (7th Cir. 2016), *cert. denied,* 137 S. Ct. 2157 (2017); *In re* Dubois, 834 F.3d 522, 533 (4th Cir. 2016), *cert. denied sub nom*. Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017).

36. *Crawford*, 758 F.3d at 1257.

37. *Id.*

38. *Id.* at 1259.

39. *Id.* at 1257.

40. *Id.* at 1256-57.

this question, held that the practice of filing claims for stale debts gave a misleading impression and violated the FDCPA.[41]

The court reasoned that just as a debt collector would have violated the FDCPA by filing a lawsuit on time-barred claims in state court, LVNV's filing of a claim past the statute of limitations in bankruptcy court also violated the FDCPA.[42] Writing for a unanimous court, Judge Goldberg stated, "[f]ederal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f" of the FDCPA.[43] The court also noted that "[s]tatutes of limitations 'protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.'"[44]

Most notably, the court used a "least sophisticated" debtor standard in its analysis.[45] The stale claim that slips through the cracks in a bankruptcy proceeding ultimately harms the true creditors and the debtor. Therefore, the least sophisticated debtor in a Chapter 13 proceeding may not be aware the claim is time-barred and unenforceable and may not object to the stale claim.[46] To the Eleventh Circuit, the filing of a stale claim is "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f."[47]

B. Numerous Other Circuits Decided the Time-Barred Claim Did Not Violate the FDCPA

Three circuits have considered similar facts to the ones present in *Crawford* and reached opposite conclusions.[48] Such was the case in *Owens v. LVNV Funding, LLC*, in which the Seventh Circuit addressed a consolidated appeal.[49] In each case, "a debt collector filed a proof of

41. *Id.* at 1261.
42. *Id.* at 1262.
43. *Id.* at 1259.
44. *Id.* at 1260 (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979)).
45. *Id.* at 1261.
46. *Id.*
47. *Id.*
48. *In re* Dubois, 834 F.3d 522, 533 (4th Cir. 2016), *cert. denied sub nom.* Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017); Owens v. LVNV Funding, LLC, 832 F.3d 726, 736-37 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017); Nelson v. Midland Credit Mgmt., Inc., 828 F.3d 749, 752 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).
49. *Owens*, 832 F.3d at 729.

claim . . . for a time-barred debt in a Chapter 13 bankruptcy proceeding."[50] After objecting, each "debtor sued the debt collector," alleging the practice violated the FDCPA.[51] Unlike the Eleventh Circuit, the Seventh Circuit granted the debt collector's motion to dismiss and found no violation of the FDCPA.[52] The majority based its reasoning on the fact that filing a stale debt claim is not "per se illegal under the FDCPA," because the definition of "claim" in the Bankruptcy Code is not merely limited to legally enforceable claims.[53] While the debtors argued "the term 'claim' [should only include] legally enforceable obligations," the court explained that as defined in the Bankruptcy Code, "claim" means 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."[54] The court also emphasized that "the statute of limitations . . . does not extinguish the underlying debt"—it merely makes the claim unenforceable.[55]

The Seventh Circuit reasoned that because bankruptcy proceedings require a disclosure about the status and origin of the debt, there is a greater chance the debtor or trustee will notice a time-barred debt.[56] Further, the court noted 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."[57] The court ultimately reasoned that filing proofs of claims that are barred by the statute of limitations is not "deceptive, misleading, unfair, or otherwise abusive as prohibited under the FDCPA."[58] Judge Wood disagreed with the majority's opinion and argued that because bankruptcy courts are similar to state and federal courts, the same rule regarding the FDCPA should apply.[59] The dissent pointed out that trustees will not catch every stale claim, and this allows for abuse of the system.[60]

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50. *Id.*
51. *Id.*
52. *Id.* at 737.
53. *Id.* at 730.
54. *Id.* (quoting 11 U.S.C. § 101(5)(A) (2012)).
55. *Id.* at 731.
56. *Id.* at 733.
57. *Id.* at 735.
58. *Id.* at 736-37.
59. *Id.* at 738 (Wood, C.J., dissenting).
60. *Id.* at 740-41.

The Fourth Circuit reached a similar conclusion as the Seventh Circuit with the case *In re Dubois*.[61] Kimberly Adkins and Chaille Dubois filed separate Chapter 13 bankruptcy petitions.[62] Atlas Acquisitions LLC then filed proofs of claims in their respective bankruptcy cases on debts that were barred by Maryland's statute of limitations.[63] The court ultimately held that Atlas's claim and conduct did not violate the FDCPA.

The court first clarified that filing a proof of claim is regulated by the FDCPA, emphasizing a broad definition of "claim."[64] Therefore, a properly filed claim is allowed unless a party (trustee or debtor) objects.[65] Even though "[f]ederal courts have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect a time-barred debt,"[66] the Fourth Circuit pointed to three reasons why bankruptcy proceedings are different than other court systems.[67] First, the court noted that "[b]ankruptcy [r]ules require claims . . . to accurately state the last transaction and charge-off date," making it easier to show that a debt is time-barred.[68] Second, the court reiterated that the bankruptcy debtor has a trustee and is often represented by council, and both are responsible for objecting.[69] Lastly, Chapter 13 debtors voluntarily initiate the proceeding, and they are often less likely to be embarrassed about objecting to stale claims.[70] In summary, the court determined "the FDCPA does not reach Atlas's conduct."[71]

The dissent, written by Judge Diaz, agreed with the court in *Crawford* and the dissent of Judge Wood in *Owens*, arguing that the practice of allowing stale debts in bankruptcy is misleading and unfair, and provides an action under the FDCPA.[72] Diaz argued that the FDCPA is purposefully broad to

61. *In re* Dubois, 834 F.3d 522 (4th Cir. 2016), *cert. denied sub nom.* Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017).

62. *Id.* at 525.

63. *Id.*

64. *Id.* at 528.

65. *Id.*

66. *Id.* at 527.

67. *Id.* at 532.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 535 (Diaz, J., dissenting).

72. *Id*. at 533; *see also* Owens v. LVNV Funding, LLC, 832 F.3d 726, 738 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017); Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014).

combat abusive behavior by debt collectors.[73] Unsophisticated debtors may not know of a statute of limitations defense for old debts, and without an objection the claim will be added to the plan.[74] Most importantly, the dissent argued this practice is an unfair abuse of the system:

> At best, a debt collector who files such a claim wastes the trustee's time. At worst, the debt collector catches the trustee asleep at the switch and collects on an invalid claim to the detriment of other creditors and, in many cases, the debtor. In either case, the debt collector misleadingly represents to the debtor that it is entitled to collect through bankruptcy when it is not.[75]

In *Nelson v. Midland Credit Management, Inc.,* the Eighth Circuit also weighed in on the issue, holding that the practice of filing a stale proof of claim in a Chapter 13 bankruptcy does not lead to liability under the FDCPA.[76] In *Nelson*, Domick Nelson defaulted on $751 of consumer debt and subsequently filed for Chapter 13 bankruptcy.[77] Midland Credit Management filed a proof of claim for the time-barred debt.[78] Nelson then sued Midland alleging violation of the FDCPA.[79] Refusing to extend the FDCPA to time-barred proofs of claim, the Eighth Circuit sided with the Seventh and Fourth Circuits.[80] Thus, the majority of the circuits to address this issue have limited the reach of the FDCPA in the Chapter 13 context.

IV. Statement of the Case

In *Midland Funding, LLC, v. Johnson*, Aleida Johnson filed for Chapter 13 bankruptcy.[81] Midland Funding, LLC then filed a proof of claim stating that Johnson owed Midland $1,879.71 in credit-card debt.[82] Midland's claim stated that the last charge on Johnson's account was more than ten years old,

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73. *In re* Dubois, 834 F.3d at 533 (Diaz, J., dissenting).

74. *See id.* at 534.

75. *Id.*

76. Nelson v. Midland Credit Mgmt., Inc., 828 F.3d 749, 752 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).

77. *Id.* at 750.

78. *Id.*

79. *Id.*

80. *See id.* at 752; *see also* Owens v. LVNV Funding, LLC, 832 F.3d 726, 736-37 (7th Cir. 2016), *cert. denied,* 137 S. Ct. 2157 (2017); *In re* Dubois, 834 F.3d 522, 535 (4th Cir. 2016), *cert. denied sub nom.* Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017).

81. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1411 (2017).

82. *Id.*

but Alabama's applicable statute of limitations was six years.[83] Johnson's counsel objected to it, and the bankruptcy court agreed by refusing to allow the stale claim.[84] Johnson then filed suit against Midland Funding for violation of the Fair Debt Collection Practices Act.[85]

The district court held that the FDCPA was not applicable in this case, but the Eleventh Circuit Court of Appeals disagreed and reversed.[86] The issue in this case was similar to the issue in all the previously discussed cases: whether a debt collector's filing of a known time-barred claim violates the Fair Debt Collection Practices Act.[87] Ultimately, the Supreme Court held the practice of filing a claim for a debt barred by the statute of limitations in a Chapter 13 bankruptcy does not violate the Fair Debt Collections Practices Act.[88]

A. The Supreme Court's Analysis

The Court began by explaining that the word "'claim' is a 'right to payment'", and is dictated by state law.[89] Alabama, along with "many other [s]tates, provides that a creditor has the right to payment" even after the statute of limitations has expired, but the statute of limitations extinguishes the remedy.[90] Johnson argued the word "claim" in the Bankruptcy Code means "enforceable claim," but the Court disagreed and explained that the Bankruptcy Code provisions do not say "enforceable claim" in the definition.[91] The Court also used § 101(5)(A), defining a claim as a right to payment regardless of whether it is "contingent . . . [or] disputed."[92] The majority further explained that an expiration of the statute of limitations has long been treated as an affirmative defense.[93]

To determine whether a debt collector who knowingly files a time barred claim in bankruptcy violates the FDCPA, the Court looked to five relevant words in the FDCPA: false, deceptive, misleading, unfair, or unconscionable.[94] The Court declared that the practice of filing a proof of

83. *Id.*; ALA. CODE § 6-2-34 (2014).
84. *Midland*, 137 S. Ct. at 1411.
85. *Id.*
86. *Id.*
87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1411-12.
91. *Id.* at 1412.
92. *Id.* (quoting 11 U.S.C. § 101(5)(A) (2012) (emphasis omitted)).
93. *Id.*
94. *Id.* at 1411.

claim known to be past the statute of limitations is not "false, deceptive or misleading," because even though the claim was time barred, it was still a valid claim.[95] However, analyzing the practice under the terms "unfair" or "unconscionable" required a closer analysis.[96]

Johnson argued that multiple lower courts found it "unfair" for debt collectors to file claims known to be time barred in civil actions to collect a debt.[97] The Court, however, pointed to the differences in the bankruptcy context versus a debt collector filing a civil action to justify a different treatment of the same claim.[98] Since Chapter 13 bankruptcies involve a trustee, along with the debtor filing the initial bankruptcy action, the Court reasoned these factors "make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance."[99]

The Court further explained raising an affirmative defense of untimeliness for stale claims could be beneficial to a debtor because the ultimate disallowance of the claim discharges the debt.[100] However, the burden is still on the debtor to know to dispute the stale claim in the first place, and this requires knowledge of the law by consumers. The Court's logic discounts the negative implications of an overlooked stale debt that continues to be paid by an unknowing debtor, even though the claim is not legally enforceable. The Court also mentioned that holding otherwise "would permit postbankruptcy litigation" without the Bankruptcy Code providing for such a remedy.[101] Thus, the majority reasoned that the filing of a manifestly time barred proof of claim in Chapter 13 bankruptcy by a debt collector is not considered a false, deceptive, misleading, unfair, or unconscionable practice under the Fair Debt Collection Practices Act.

B. The Dissent's Evaluation

Not all members of the Court joined the majority opinion in *Midland Funding, LLC, v. Johnson*. The dissent (Justices Sotomayor, Ginsburg, and Kagan) began by pointing out the realities of modern debt collection practices in the United States. Many debts today "are increasingly likely to end up in the hands of professional debt collectors—companies whose business it is to

95. *Id.* (quoting 15 U.S.C. § 1692(e-f) (2012)).
96. *Id.* at 1413.
97. *Id.*
98. *Id.* at 1413-14.
99. *Id.*
100. *Id.* at 1414.
101. *Id.* at 1415.

collect debts that are owed to other companies."[102] These companies can purchase the old debt "for pennies on the dollar."[103] Once the state statute of limitations has run, the debt purchaser's only hope is that the debtor will fail to invoke the statute of limitations or appear to defend themselves once a claim is filed in state court.[104] However, over 90% of consumers do not appear for these court cases.[105] Justice Sotomayor emphasized that "[e]very court to have considered the question has held that a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA."[106] Barred in state courts, the debt buyers are now looking to bankruptcy proceedings—specifically those falling under Chapter 13—to attempt to collect on their stale debt.[107]

While the majority contends that bankruptcy's structural features reduce the risk of unnoticed stale debt, the dissent points out that everyone with actual experience insists this is false.[108] For example, the United States argued in its amicus curiae brief that trustees "cannot realistically be expected to identify every time-barred . . . claim filed in every bankruptcy."[109] The trustees, in their own amicus curiae brief, classified "the practice as 'wasteful' and 'exploit[ative].'"[110] The majority also reasoned that the person filing for bankruptcy is more sophisticated than a debtor in a civil suit because he made the choice to file.[111] However, the dissent reminded that people filing for bankruptcy are declaring to the court they are unable to meet their bills and are in need of assistance.[112] Although the party filing the initial lawsuit is reversed, it is not true that the debtor in bankruptcy is in a superior position to that of a debtor in a typical civil suit.[113] Additionally, the majority suggests that sometimes a consumer will benefit if a claim is filed.[114] This is not a realistic representation of practice.[115] If there is a failure to object to the

102. *Id.* at 1416 (Sotomayor, J., dissenting).
103. *Id.*
104. *See id.* at 1417.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1420.
109. *Id.* (quoting Brief for United States as Amicus Curiae Supporting Respondent at 25-26, *Midland*, 137 S. Ct. 1407 (No. 16-348)).
110. *Id.*
111. *Id.* at 1413.
112. *Id.* at 1420.
113. *Id.* at 1420-21.
114. *Id.* at 1421.
115. *Id.*

stale claim, debtors could end up worse off than if they had not entered into bankruptcy in the first place.[116] This practice of allowing debt collectors to bet on legally unenforceable claims slipping past unknowing debtors is unfair.

The dissent correctly recognizes that the practice of knowingly filing claims that are unenforceable based on statutes of limitations "'manipulates the bankruptcy process by systematically shifting the burden' to trustees and debtors to object even to 'frivolous claims'—especially given that filing an objection is costly, time consuming, and easy to overlook."[117] Stated differently, "[d]ebt collectors do not file these claims in good faith; they file them hoping and expecting that the bankruptcy system will fail."[118] The dissent also states that the FDCPA and Bankruptcy Code were intended to "coexist," meaning FDCPA claims are not barred by the Bankruptcy Code.[119] The dissent points out that Congress can amend the FDCPA to make it clear that filing stale proofs of claim in bankruptcy actions is a violation of the Act.[120] Justice Sotomayor correctly notes the inherent unfairness in allowing debt collectors to game the bankruptcy system by filing stale claims; the practice is unfair to the bankruptcy filer, trustee, and other creditors with valid claims.

V. Why Midland Funding, LLC v. Johnson *Was Wrongly Decided*

Allowing debt collectors to take advantage of debtors by filing time-barred proofs of claims in bankruptcy cases, when they would otherwise be prohibited from collecting in a typical civil lawsuit, contravenes the purpose of the FDCPA and undermines the protections of the Bankruptcy Code. Bankruptcy courts have limited resources to process objections, and those resources should not be exhausted processing objections that are based on unenforceable, stale claims that should never have been filed. Considering the realities of debt buying today, the history of unenforceable claims deemed a violation of the FDCPA, attempts by debt collectors to undermine statutes of limitations, and the extra burden placed on trustees to filter through extra claims, one can understand the reasoning of the dissent in *Midland Funding, LLC v. Johnson*.

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116. *Id.*

117. *Id.* at 1418 (quoting Complaint at 1, 12, *In re* Freeman-Clay, 879 B.R. 423 (Bankr. W.D. Mo. 2017) (No. 14-41871)).

118. *Id.* at 1419.

119. *See id.*

120. *Id.* at 1421.

A. Realities of Debt Collection Practices Today

An overview of the modern debt-buying system is essential in order to better understand the policy issues at hand. Purchasing stale debt is big business. *Midland Funding, LLC v. Johnson* will likely impact the rights of individuals filing for Chapter 13 bankruptcy and create a large burden for Chapter 13 trustees. The United States, representing the Consumer Financial Protection Bureau, and the United States trustees stressed the realities of the debtor, creditor, and debt collector relationship today, and stated that debt buying is a substantial part of the debt-collection business today.[121] One analysis from 2006-2009 showed "debt buyers paid on average 7.9 cents per dollar for debts less than three years old, 3.1 cents per dollar for debts three to six years old, 2.2 cents per dollar for debts six to 15 years old, and effectively nothing for debts more than 15 years old."[122]

Every state has a statute of limitations period for suits involving collection of unpaid debts, typically "between three to six years," and none "longer than [fifteen] years."[123] It is the debt collector's job to find a way to make money off stale claims, even if they are supposed to be unenforceable. Even though the Bankruptcy Code allows the trustee and other creditors to object to stale claims, it is inevitable that some stale proofs of claims will escape detection because of the volume of bankruptcy litigation.[124] The United States pointed out that deliberately filing proofs of claims for debts known to be unenforceable "reflects a calculated effort to exploit the imperfections of the [Bankruptcy] Code's disallowance mechanisms, and to prevent the claims-allowance process from functioning as Congress intended."[125]

B. Every State Court to Decide the Issue Has Agreed the Practice Violates the FDCPA

All other courts to confront the issue of debt collectors filing suit in order to knowingly collect a time-barred debt have held that such suits violate the

121. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 108, at 3 (quoting CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2016, at 10 (2016)).

122. *Id.* (citing FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 22-24 (2013)).

123. *Id.* at 3-4. For example, Oklahoma law provides for a five-year statute of limitations for collection of debts on accounts if in writing. 12 OKLA. STAT. § 95(1) (2011).

124. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 108, at 9.

125. *Id.*

FDCPA's mandate.[126] Now that debt collectors have been disallowed from filing lawsuits in typical civil courts, they look to bankruptcy to prey on ignorant filers.[127] Although there are different management mechanisms in bankruptcy proceedings, the practice is still "unfair" and "misleading." In cases outside of bankruptcy, Rule 11 of the Federal Rules of Civil Procedure specifically disallows attorneys from signing off on any document filed in court where the claims are not warranted by existing law.[128] Federal courts agree that Rule 11 is violated when a plaintiff knows or can easily discover his claim is "barred by an 'obvious' affirmative defense" such as a statute of limitations defense.[129] Filing stale proofs of claim should be treated the same in the bankruptcy context. Such a practice is unfair under the FDCPA because "a creditor that knowingly files a proof of claim for a time-barred debt seeks money that it can obtain only if the bankruptcy system fails to operate as Congress intended."[130] This behavior is abusive and forces the trustee to spend time and resources to object to a claim it otherwise would not have to object to.

C. Debt Collectors Should Not Be Allowed to Undermine Statutes of Limitations

Statutes of limitations serve numerous purposes. First, they protect against the unfairness of forcing someone to defend a stale claim after his memories have faded and witnesses or other evidence can no longer be found.[131] Second, statutes of limitations protect against "fraud-minded plaintiffs who may assert fraudulent claims at a time when the true facts can no longer be proved."[132] Third, they provide closure to potential defendants and the public at large because liability will not extend forever and cause uncertainty in the

126. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting).

127. *See id.*

128. FED. R. CIV. P. 11(b)(2) ("By representing to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument . . . .").

129. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 108, at 11.

130. *Id.* at 24.

131. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 590-91 (1996).

132. *Id.* at 591.

market.[133] Lastly, statutes of limitations "promote the goal of efficient judicial administration."[134]

Debt collectors should not be able to undermine well-known and long-accepted statutes of limitations that serve important policy functions. Allowing debt collectors to attempt to evade the statute of limitations by filing claims they hope will be overlooked allows debt collectors to act in bad faith. As Justice Sotomayor's dissent correctly points out, this practice is both unfair and unconscionable under the FDCPA.[135]

D. The Practice of Allowing Creditors to File Time-Barred Proofs of Claim Increases the Burden on Bankruptcy Trustees

Even though the bankruptcy context offers more protections to debtors than a typical civil claim would,[136] this does not mean that filing time-barred claims should be allowed. As Judge Diaz's dissenting opinion pointed out in *In re Dubois*, at best the debt collector "wastes the trustee's time," and at worst the trustee overlooks the stale claim, meaning the debt collector collects on an invalid claim "to the detriment of other" valid creditors and the debtor.[137] Allowing stale claims and then expecting the bankruptcy trustee to object to those claims is a wasteful and inefficient use of the trustee's time and the state's resources. Expecting trustees to catch and object to every claim that is past the state's statute of limitations is also not realistic.[138] Instead of shifting the burden to the unknowing consumer, the overworked trustee, and the other proper creditors, these time-barred claims should not be allowed in the first place.

E. The Practice Is Fundamentally Unfair

Invoking the judicial process to enforce a debt should only be allowed when the creditor has a good-faith reason to believe the debt is enforceable. The National Association of Chapter Thirteen Trustees supported Johnson stating, "Midland's defense is essentially that creditors have a right to see whether their claims will slip through the cracks . . . ."[139] The amicus brief highlighted the

133. *Id.*

134. *Id.*

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

136. Owens v. LVNV Funding, LLC, 832 F.3d 726, 736 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017).

137. *In re* Dubois, 834 F.3d 522, 534 (4th Cir. 2016) (Diaz, J., dissenting), *cert. denied sub nom.* Dubois v. Atlas Acquisitions, LLC, 137 S. Ct. 2158 (2017).

138. *See id.*

139. Brief for the National Ass'n of Chapter Thirteen Trustees as Amicus Curiae Supporting Respondent at 12, *Midland*, 137 S. Ct. 1407 (No. 16-348).

problem that information disclosed in the proof of claim is not always sufficient to determine if the claim is past the statute of limitations.[140] The trustees pointed out that they have a "fiduciary dut[y] to the estate," and "are often pitted against debtors in chapter 13 matters."[141] Even if stale claims are more likely to be caught in bankruptcy proceedings, this does not solve the problem of some claims escaping detection or slipping through the cracks in the system. The only reason for a creditor to file a time-barred claim is the hope that it goes unnoticed and that a debtor makes a payment to rejuvenate the stale debt. The Supreme Court instead should have disallowed these unenforceable claims to be filed to begin with.

Bankruptcy experts Kenneth Klee and Whitman Holt agree that *Midland Funding* is an unfortunate decision and "not how Congress would have intended the bankruptcy system to function."[142] This sentiment is echoed by the dissent's warning that "the law should not be a trap for the unwary."[143] As the practice of filing stale claims is fundamentally unfair, there must be recourse for affected debtors. The best and easiest recourse is the FDCPA, as it was originally intended to level the playing field and grant consumer relief.

F. Opportunities for Future Change

Since the Supreme Court has already decided the issue, consumers must now look to the legislature for change. Congress has the power to change both the FDCPA and the Bankruptcy Code to prohibit time-barred claims by debt collectors and sanction those who make such frivolous claims. Congress could clarify within the FDCPA that such a practice is "unfair" or "misleading." As for enforcement under the FDCPA, Congress could include an action for debt collectors who file stale debt proofs of claims in bankruptcy proceedings—specifically Chapter 13. Congress could also change the Bankruptcy Code to disallow claims past the statute of limitations and change the definition of a claim in the bankruptcy context to "enforceable claim."

If Congress fails to act, however, all hope is not lost. Another avenue of recourse may include courts that are willing to use their rule 9011 sanctioning power against debt collectors who regularly file stale proofs they know to be uncollectible.[144] Associations, such as the National Association of Chapter Thirteen Trustees, could also create a streamlined process for detecting and

140. *Id.* at 14.

141. *Id.* at 16.

142. KENNETH N. KLEE & WHITMAN L. HOLT, SUPREME COURT'S HOLDING IN MIDLAND FUNDING, LLC V. JOHNSON (June 5, 2017), 2017 Emerging Issues 7560 (Lexis).

143. *Midland*, 137 S. Ct. at 1421 (Sotomayor, J., dissenting).

144. KLEE & HOLT, *supra* note 141.

objecting to stale claims.[145] Whatever the future of the law may hold, it is especially important today for lawyers and those filing for bankruptcy to be aware of potential stale claims and to properly file an objection.

VI. Conclusion

The Supreme Court's holding in *Midland Funding, LLC v. Johnson* is a regrettable decision that failed to appreciate the realities of today's debt buying industry and the targeted practices the FDCPA aims to prevent. The Court took a narrow view when interpreting what "claim" encompasses instead of siding with those that believe allowing a stale debt claim goes against the purpose and policy of bankruptcy and the FDCPA. This narrow interpretation of "claim" is problematic. The purpose of the FDCPA is to prevent unfair debt collection practices. Because there are multiple policy considerations for why filing a claim past the statute of limitations is unfair, filing such a claim should not be allowed. The purpose of bankruptcy is to grant a fresh start to the debtor and fairly divide the assets among the creditors. Every state has enacted statutes of limitations, and it is unfair to allow a debt collector to game the system to bet on a claim slipping through the cracks.

It is unfortunate that the Supreme Court took such a technical approach to an issue that should have been decided differently based on the realities of the debt buying industry and the purposes behind both bankruptcy and the FDCPA. A wiser and simpler approach would be to disallow claims that are knowingly past the statute of limitations. This creates clarity and does not reward debt collectors when they file claims they hope will go unnoticed. Every other court to consider the issue of time-barred claims outside of bankruptcy agrees that such a practice is a violation of the FDCPA because it is unfair. Stale claims in the bankruptcy context should not be treated any differently. These claims plague the bankruptcy system; frustrate its ultimate purpose; and waste the time of the trustee, bankruptcy filer, and other proper creditors.

The lamentable reality is that debt collectors are allowed to file proofs of claims that are time-barred. As a practice point, attorneys, trustees, and other creditors must be careful to watch for these stale claims and object to them. Otherwise, debt collectors will continue to play hide and hope nobody seeks.

Allison Meinders

145. *Id.*