

Bench & Bar Committee
Lunch & Learn Program:

FDCPA & Bankruptcy

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Disclaimers

- ▶ The opinions expressed herein are those of the presenters and do not necessarily represent the views of, and should not be attributed to, their employers, the United States Trustee Program, and the United States Department of Justice.



FDCPA & Bankruptcy

- ▶ Overview of the FDCPA
- ▶ Stale POCs and the *Johnson* case
 - ▶ Issue: Is filing an obviously time-barred POC a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the FDCPA?
- ▶ Debt buyers and the *Henson* case
 - ▶ Issue: Does a debt purchaser qualify as a “debt collector” subject to the FDCPA?



The FDCPA



The FDCPA

- ▶ [Fair Debt Collection Practices Act](#), 91 Stat. 874, 15 U. S. C. §1692 et seq.
- ▶ Purpose: protect unsophisticated consumers from unscrupulous debt collectors
- ▶ Sets forth rules governing communications between debt collectors and consumer debtors
 - ▶ The FDCPA prohibits a debt collector from asserting any “false, deceptive, or misleading representation,” or using any “unfair or unconscionable means” to collect, or attempt to collect, a debt. [Midland Funding, LLC v. Johnson](#), 137 S.Ct. 1407, 1410 (2017)
- ▶ Authorizes private lawsuits and weighty fines to deter wayward collection practices.
 - ▶ [Henson v. Santander Consumer USA, Inc.](#), 137 S.Ct. 1718, 1719 (2017)



The FDCPA

- ▶ *“Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”*
- ▶ Congress, in enacting the FDCPA, sought to eliminate **abusive** debt collection practices by debt collectors



What is “abusive”?

- ▶ Virtually any action (or inaction) that violates any provision of the FDCPA

#	What is prohibited
1692c	Improper communication (with a consumer or third party)
1692d	Harassment or abuse
1692e	False or misleading representations (the “least sophisticated consumer”)
1692f	Unfair or unconscionable means



FDCPA Violations

- ▶ **Strict liability**
 - ▶ To establish a claim, a plaintiff must show:
 - ▶ (1) the defendant is a debt collector, and
 - ▶ (2) the collector engaged in an act or omission prohibited or required by the FDCPA in attempting to collect a debt
- ▶ **If debt collectors violate the FDCPA,**
 - ▶ Federal Trade Commission is authorized to bring an enforcement action
 - ▶ Consumer debtors also have a private right of action
- ▶ **Debt collectors who violate the FDCPA are liable for:**
 - ▶ Actual damages (out of pocket expenses, damages for emotional distress)
 - ▶ Statutory damages up to \$1,000
 - ▶ Attorney's fees and costs



The FDCPA: Limitations

- ▶ Covers only consumer debts; NOT commercial debts of any kind
- ▶ Claims are only enforceable against debt collectors; NOT to creditors
 - ▶ See *Henson v. Santander Consumer USA, Inc.*, 137 S.Ct. 1718 (2017)



The FDCPA and Bankruptcy

- ▶ Creditor harassment can violate both the FDCPA and the automatic stay/discharge injunction
 - ▶ Automatic stay (11 U.S.C. § 362(a)) prohibits collection activity
 - ▶ Discharge injunction (11 U.S.C. § 524) prohibits attempts to collect discharged debts

- ▶ Cases
 - ▶ *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004) (debtors could bring a suit against creditors under the FDCPA for conduct that violated the automatic stay)
 - ▶ *Garfield v. Ocwen Loan Servicing*, 811 F.3d 86 (2d Cir. 2016) (“[n]o irreconcilable conflict exists between the post-discharge remedies of the Bankruptcy Code and the FDCPA”)



“They are simply different rules, with different requirements of proof and different remedies.”
Randolph v. IMBS, Inc., 368 F.3d 726, 732 (7th Cir. 2004).

	Bankruptcy	FDCPA
Who	Anyone	Debt collector only
Scienter	Willfulness	Strict liability (§ 1692e(2)(A))
Defense	None	Bona fide error plus due care (§ 1692k(c)) or reliance on FTC opinion (§ 1692k(e))
Statutory damages	None	\$1,000 maximum (§ 1692k(a)(2)(A))
Compensatory damages	Yes	Yes (§ 1692k(a)(1))
Punitive damages	Yes	No
Cap of class recovery	No	Yes (§ 1692k(a)(2)(B)(ii))
Maximum recovery	No	\$500,000 or 1% of net worth, whichever is less (§ 1692k(a)(2)(B)(ii))
Attorney’s fees to debtor	No	Yes (§ 1692k(a)(3))
Attorney’s fees to creditor	No	Yes (§ 1692k(a)(3))
Statute of limitations	None (laches defense only)	One year (§ 1692k(d))

Filing and reviewing POCs



Claims filed in Bankr. N.D. Ga.

Year	Claims	Amended Claims
2016	108,067	9,300
2017 (through June)	55,405	3,768



Who has duty to review POCs?

Chapter	Who has duty	Duty set forth in
Chapter 13	Debtor's attorney	General Order No. 18-2015
		Rights & Responsibilities Statement (#13)
	Chapter 13 Trustee	Handbook for Chapter 13 Standing Trustees (10/1/2012)
Chapter 7	Chapter 7 Trustee	Handbook for Chapter 7 Trustees (10/1/2012)



Johnson



Cases leading up to *Johnson*

- ▶ *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).
 - ▶ Ruling: a debt collector can be liable for “misleading and unfair practices” for filing of a proof of claim on a time-barred debt
 - ▶ Did not address whether the Code “displaced” the Act
- ▶ Split of authority
 - ▶ Does the Code preempt the FDCPA?
 - ▶ Preemption v. preclusion



Johnson

- ▶ Debt collector Midland Funding, LLC filed a proof of claim in Aleida Johnson's chapter 13 case
 - ▶ The debt upon which Midland based its claim was outside the applicable state statute of limitations
 - ▶ The debtor objected to the claim, and the bankruptcy court denied Midland's claim
 - ▶ The debtor later brought suit for an FDCPA violation
- ▶ The district court dismissed the debtor's case after holding that the FDCPA did not apply in bankruptcy



Johnson v. Midland Funding, LLC,
823 F.3d 1334 (11th Cir. 2016)

- ▶ The 11th Circuit reversed the decision and determined that Midland's conduct in filing the proof of claim on clearly time-barred debt violated the FDCPA
- ▶ Found that there is no irreconcilable conflict between the FDCPA and the Code
 - ▶ While the Code contemplates that a creditor may file a time-barred claim, this does not insulate the creditor from the FDCPA if the creditor is subject to the Act



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

- ▶ 5-3 decision overturning 11th Circuit decision
- ▶ That a time-barred claim is a “claim” under 11 U.S.C. § 101(5)
 - ▶ Note exceptions under state law (MS and WI)
- Filing of a time-barred proof of claim is not “misleading”
 - Noted the “legal sophistication of the audience,” referring to the C13T
 - Failed to appreciate that a debtor is part of that audience, too
 - Because the C13T must examine proofs of claims and object to time-barred claims, filing an “accurate” proof of claim on a time-barred debt was not misleading
- ▶ Such POCs are not “unfair” or “unconscionable”
 - ▶ Distinguished the POC process from civil suits on time-barred debts
 - ▶ Really?



Midland Funding, LLC v. Johnson

Government's Amicus Brief

The FDCPA prohibits debt collectors from invoking judicial process to collect a time-barred debt both in and outside of bankruptcy.

SCOTUS Opinion

Bankruptcy is unique. Neither the FDCPA nor the Bankruptcy Code indicate Congressional intent to use FDCPA structure to address bankruptcy-related questions.



Midland Funding, LLC v. Johnson

Government's Amicus Brief

When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA.

SCOTUS Opinion

The word “enforceable” does not appear in the Bankruptcy Code’s definition of “claim.” There is nothing misleading, deceptive, or unfair in asserting the right to payment by filing a proof of claim subject to the claims disallowance process.



Midland Funding, LLC v. Johnson

Government's Amicus Brief

A creditor who files a proof of claim for a time-barred debt is subject to Rule 11 sanctions by the bankruptcy court.

SCOTUS Opinion

In 2009, the Advisory Committee on Rules of Bankruptcy Procedure considered and rejected a Rule 11 proposal requiring creditors to certify that there is no valid statute of limitations defense to a proof of claim.



Midland Funding, LLC v. Johnson

Government's Amicus Brief

The Bankruptcy Code does not authorize the knowing filing of a proof of claim for an unenforceable time-barred debt and directs that such claim be disallowed.

SCOTUS Opinion

The Bankruptcy Code employs an expansive definition of the term “claim” and has an effective claims-allowance process specifically designed to sift and disallow unenforceable claims.



Midland Funding, LLC v. Johnson

Government's Amicus Brief

Payments made to time-barred creditors will reduce payments to any unsecured creditors.

SCOTUS Opinion

Knowledgeable trustees and procedural bankruptcy rules directly guide the proper evaluation and payment of claims. The claims process facilitates the presentation of affirmative defenses and disallowance of unenforceable claims.



Midland Funding, LLC v. Johnson

Government's Amicus Brief

Nothing in the Bankruptcy Code suggests that Congress intended to displace the FDCPA in favor of purportedly exclusive remedies provided by the Bankruptcy Code and Rules.

SCOTUS Opinion

Though the Bankruptcy Code does not altogether displace the FDCPA, it creates and maintains a delicate balance of a debtor's protections and obligations. Finding the FDCPA applicable to the analysis of stale debt claims would upset that delicate balance.



So, where are we?



The FDCPA is not dead

- ▶ The Court did not directly address whether FDCPA claims are precluded by the Code
- ▶ What if the critical information necessary to evaluate the claim is false? Or missing?
- ▶ Debtor's counsel should also look carefully at the nature of the claim and the party filing the POC



Debt buyers & *Henson*



Henson v. Santander Consumer USA Inc., 137 S.Ct. 1718 (2017)

- ▶ Unanimous decision by Justice Gorsuch
- ▶ Holding: Santander, a debt buyer, was not a debt collector under FDCPA's second definition of debt collector
- ▶ A debt buyer is not subject to the FDCPA as an entity regularly collecting debts “owed or due another”



Henson: Facts

- ▶ Plaintiffs originally obtained car loans from CitiFinancial Auto
- ▶ When plaintiffs defaulted, CitiFinancial repossessed the vehicles
 - ▶ Sold the vehicles, and hired Santander as a servicer to collect the alleged deficiency balances
 - ▶ Plaintiffs were part of a class action against CitiFinancial Auto re: repossession practices
 - ▶ Settlement agreement waived alleged deficiency balances
- ▶ After purchasing plaintiffs' accounts, Santander attempted to collect the alleged deficiency balances
- ▶ Plaintiffs brought an FDCPA lawsuit alleging misrepresentation of the amount owed and authority to collect the debt



Debt Collector

The FDCPA defines a debt collector (in part) as:

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, **or** who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another

15 U.S.C. § 1692a(6).



“Principal purpose”

- ▶ The Court did not address whether Santander met the “principal purpose” prong
- ▶ The district court and the Fourth Circuit had both concluded that Santander was NOT a “principal purpose” debt collector
 - ▶ 817 F.3d 131, 137 (4th Cir. 2016)
 - ▶ 2014 WL 1806915 at *4 (D. Md. May 6, 2014)
- ▶ Santander claimed that its principal purpose was loan origination
 - ▶ Different from debt buyers that are primarily and exclusively engaged in the purchase and collection of defaulted debts



“Principal purpose” continued . . .

- ▶ Attorneys bringing FDCPA claims against debt buyers should clearly allege that debt collection is the principal purpose of the defendant’s business
- ▶ The complaint should also provide factual basis to support the allegation
 - ▶ *Pollice v. Nat’l Tax Funding, L.P.*, 225 F.3d 379, 404 n.27 (3d Cir. 2000)
 - ▶ Admission by the defendant that it “exists solely for the purpose of holding claims for delinquent taxes and municipal obligations” showed that its principal purpose was the collection of debts
 - ▶ *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013)
 - ▶ Simply alleging that debt collection makes up “some part” of the defendant’s business is insufficient to state a claim under principal purpose



Developments post *Henson*

- ▶ NCLC, *Fair Debt Collection*, www.library.nclc.org
- ▶ Check out litigation resources (model briefs, pleadings, materials)
<https://www.nclc.org/litigation/henson-v-santander.html>
- ▶ Email your briefs and decisions to henson@nclc.org



Questions?

