Florida Law Review

Volume 72 | Issue 2 Article 1

Bankruptcy's Adjunct Regulator

Alexander Sickler

Kara Bruce

Recommended Citation

Alexander Sickler and Kara Bruce, *Bankruptcy's Adjunct Regulator*, 72 Fla. L. Rev. 159 ().
Available at: https://scholarship.law.ufl.edu/flr/vol72/iss2/1

BANKRUPTCY'S ADJUNCT REGULATOR

Alexandra Sickler

Kara Bruce[*]

Abstract

This Article bridges the fields of consumer finance and bankruptcy by presenting the first comprehensive study of the Consumer Financial Protection Bureau's potential as bankruptcy regulator. It provides an in-depth picture of how the Bureau's regulatory authority crosses over into the consumer bankruptcy system. Based on the observations of this study, it makes the normative case that the Bureau should adopt a more purposeful bankruptcy-directed regulatory agenda. It provides a detailed framework for how the Bureau could collaborate with bankruptcy's existing regulators to address pernicious consumer protection violations in bankruptcy. It also observes how, in the current political climate, other regulators can capitalize on the fruits of the Bureau's earlier work to enhance their own effectiveness.

* Associate Professor, University of North Dakota School of Law. Professor of Law, University of Toledo College of Law. We thank Michael Blankenheim, Chris Bradley, Matthew Bruckner, Liz McCuskey, and Evan Zoldan, as well as the participants in the AALS Debtor/Creditor Rights Panel titled "*Consumer Financial Protection Bureau: Past, Present, and Future*," including Kathleen Engel, Deepak Gupta, and Pat McCoy, and the faculties at the University of North Dakota School of Law and Willamette University College of Law for feedback on this draft. We also thank our friends at the U.S. Trustee Program and at the CFPB for their willingness to answer questions. Anne Mostad-Jensen provided valuable research assistance. The University of Toledo College of Law provided research funding to support this project.

INTRODUCTION

Since its inception, the Consumer Financial Protection Bureau (the Bureau) has regulated a broad swath of conduct relating to consumer credit.[1] This regulatory activity has, in several distinct ways, carried over into consumer bankruptcy.[2] The Bureau has regulated bankruptcy issues directly, for instance by adopting rules that govern how mortgage creditors communicate with borrowers in bankruptcy.[3] But more often, the Bureau's impact in consumer bankruptcy is a side effect of its oversight of debt collection and credit reporting markets.[4]

Although the Bureau has had meaningful impact in consumer bankruptcy cases, few scholars or commenters have acknowledged the role the Bureau plays in this space. Bankruptcy and consumer protection law often operate in independent silos. Many consumer protection advocates view bankruptcy to be a remote and specialized field, while bankruptcy proponents tend to view bankruptcy as a complete and exhaustive system.[5] This Article bridges the fields of consumer finance and bankruptcy by presenting the first comprehensive study of the Bureau's potential as bankruptcy regulator.

In several earlier articles, we explore how consumer bankruptcy's existing regulators struggle to respond to negative-value bankruptcy misconduct.[6] The bankruptcy system, which is premised on a litigation-

---

1. *See generally* SARAH JOHNSON AUCHTERLONIE & ALEXANDRA EVERHART SICKLER, CONSUMER FINANCIAL LAW AND COMPLIANCE (BNA 2017).

2. *See infra* Part III.

3. *See infra* Section II.A.2.

4. *See infra* Part III.

5. *See, e.g.*, Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002) (stating that the Bankruptcy Code features "complex, detailed, and comprehensive provisions" that "demonstrate[] Congress's intent to create a whole system . . . [to] adjust all of the rights and duties of creditors and embarrassed debtors alike" (quoting MSR Expl., Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996))).

6. *See, e.g.*, Kara Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, 69 BAYLOR L. REV. 479, 482–86 (2017) [hereinafter Bruce, *Enforcement Gap*]; Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 23–24 (2013) [hereinafter Bruce, *Debtor Class*]; Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 444–46 (2016) [hereinafter Bruce, *Vindicating*]; Kara J. Bruce & Alexandra P.E. Sickler, *Private Remedies and Access to Justice in a Post-*Midland *World*, 34 EMORY BANKR. DEV. J. 365, 375 (2018) [hereinafter Bruce & Sickler, *Private Remedies Post-*Midland]; Alexandra P. Everhart Sickler, *The (Un)Fair Credit Reporting Act*, 28 LOY. CONSUMER L. REV. 238, 240–41 (2016) [hereinafter Sickler, *Unfair Credit*]. There are multiple discrete examples of this problem. *See, e.g.*, Kara J. Bruce, *Channeling Punitive Damage Awards Under 362(k)*, BANKR. L. LETTER (Thomson Reuters, St. Paul, Minn.), Apr. 2018, at 1, 2–3 [hereinafter Bruce, *Channeling Under 362(k)*] (discussing Bank of America's egregious pattern of automatic stay violations); Kara J. Bruce, *Debt Buyers Beware: Filing Proofs of Claim for Time-Barred Debt in the Eleventh Circuit and Beyond*, BANKR. L. LETTER (Thomson Reuters, St. Paul, Minn.), June 2016, at 1, 2–3 [hereinafter Bruce, *Debt Buyers Beware*]

based model of regulation, relies on parties involved in a case to address misconduct by filing objections, or commencing contested matters or adversary proceedings.[7] But much of the misconduct in bankruptcy, standing alone, generates injuries too small to justify the professional time and expense of combating them. As such, creditor behavior that has a *de minimis* effect in an individual case can amount to a massive wealth transfer and undermine the integrity of the bankruptcy process.[8] In this Article, we make the case that the Bureau should adopt a more purposefully bankruptcy-directed regulatory agenda. We provide a detailed framework for how the Bureau could collaborate with bankruptcy's existing regulators to better address these pernicious consumer protection violations.

To be sure, much of the Bureau's regulatory potential in bankruptcy will remain unrealized in the current political climate, under which the Bureau exercises its authority sparingly.[9] But administrations change, and federal consumer financial laws and bankruptcy law will continue to intersect. Thus, the observations we make regarding the scope of the Bureau's authority and its regulatory potential will be relevant to future administrations. In an effort to achieve more immediate impact, this Article concludes by examining how, at present, other regulators can use the fruits of the Bureau's existing work to improve compliance in bankruptcy.

This Article proceeds as follows: Part I describes the regulatory deficiencies that led to the Bureau's creation and outlines, in broad strokes, the scope of the Bureau's authority. Part II details the full scope of the Bureau's regulatory authority—rulemaking, supervision, and enforcement—and catalogs the history of Bureau activities that directly or indirectly affect consumer bankruptcy. Part III argues that the bankruptcy system would benefit if the Bureau pursued an intentional, bankruptcy-focused regulatory strategy. Part IV provides a blueprint that the Bureau might use to build this bankruptcy-focused regulatory strategy.

(discussing debt buyers' practice of flooding the bankruptcy system with proofs of claim for debt for which the statute of limitations has run); Kara J. Bruce, *Recent Developments in Educational-Benefit Discharge Litigation*, BANKR. L. LETTER (Thomson Reuters, St. Paul, Minn.), Oct. 2018, at 1, 2–4 [hereinafter Bruce, *Educational Discharge*] (discussing cases that allege student loan servicers improperly collect discharged private student loan debt); Kara Bruce, *Recent Developments in Student Loan Non-Dischargeability: Aggregating Discharge-Violation Claims*, BANKR. L. LETTER (Thomson Reuters, St. Paul, Minn.), Jan. 2019, at 1, 2–3 [hereinafter Bruce, *Aggregating Discharge Claims*] (same).

7. *See infra* Part IV.

8. *See* Bruce & Sickler, *Private Remedies Post-*Midland, *supra* note 6, at 376.

9. *See infra* Part IV.

I. COMPREHENSIVE CONSUMER FINANCIAL PROTECTION: THE PROMISE OF DODD-FRANK

Congress created the Consumer Financial Protection Bureau as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act),[10] which was enacted in the wake of the 2008 global financial crisis.[11] This Part explores the systemic weaknesses that led to the Bureau's creation and provides a broad overview of the financial activities and industries that the Bureau oversees.

A. *History of the Consumer Financial Protection Bureau*

Before the Bureau's creation, the federal regulatory framework for consumer financial products and services was fragmented and duplicative.[12] Several federal agencies were charged with consumer financial protection, but none had consumer matters as its sole focus.[13] On the contrary, the dominant regulators of financial services were primarily focused on ensuring the safety and soundness of the banks that they regulated.[14] This focus overshadowed, and sometimes conflicted with, the consumer protection missions of these agencies.[15] Jurisdictional limitations and staffing resources also hindered agencies' ability to address violations of federal consumer financial protection laws.[16]

These structural limitations engendered systemic weaknesses. For example, the decentralized regulatory structure made the financial system vulnerable to arbitrage. Because federal bank regulators competed to issue bank charters (and earn the associated chartering fees), regulators

---

10. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 & 15 U.S.C.).

11. NICOLE VANATKO, CONG. RESEARCH SERV., R45163, REGULATORY REFORM 10 YEARS AFTER THE FINANCIAL CRISIS: DODD-FRANK AND SECURITIES LAW 2 (2018).

12. *See* S. REP. NO. 111-176, at 10 (2010); *see also* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 327 (2013).

13. Levitin, *supra* note 12, at 330; *see* Heidi Mandanis Schooner, *Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit*, 18 LOY. CONSUMER L. REV. 43, 61 (2005) (explaining that the U.S. regulatory system is set up to be "institutional," with regulators from each industry—banking, insurance, securities, and so on—handling the consumer protection aspects of those industries).

14. *See* Levitin, *supra* note 12, at 330.

15. *Id.* Indeed, safety and soundness concerns focus primarily on bank profitability, and practices that might be deemed unfair, deceptive, and abusive can also be quite profitable. *Id.* at 330–31.

16. For an example of jurisdictional limitations, the Federal Trade Commission (FTC) had authority to enforce the Fair Debt Collection Practices Act (FDCPA) but lacked the authority to issue rules under the FDCPA. *See* Lisa Stifler, *The Consumer Financial Protection Bureau, the First Six Years: a Necessary Cop on the Beat, Reflections on the Fisher Memorial Program*, 71 CONSUMER FIN. L.Q. REP. 191, 193 (2017). In addition, before the Bureau was created, regulatory agencies had few dedicated staffers working on consumer finance issues. *See* Levitin, *supra* note 12, at 332.

with laxer consumer protection rules could attract more business.[17] And, when consumer protection issues came to the fore, agencies largely failed to react, engaging in "finger pointing" among regulators with overlapping authority.[18] At the same time, preemption doctrines seriously undermined state regulators' ability to serve as an effective stopgap.[19]

While these flaws in consumer financial regulation were no secret leading up to the 2008 global financial crisis,[20] the crisis made them impossible to ignore. Failures in regulatory oversight and accountability had allowed trillions of dollars in risky mortgages to be originated, packaged, and sold to investors.[21] When the mortgage bubble finally burst, the billions of dollars in losses brought financial industry behemoths to their knees, taking the global economy down with them.[22] In the fallout from the crisis, consumers faced not only personal financial hardship, but also procedural abuse at the hands of a financial industry that was unequipped to handle the massive numbers of defaults its practices had generated.[23]

The Dodd-Frank Act, which was enacted in 2010, sought to address the widespread regulatory failures that led to the global financial crisis and permitted consumers to be harmed in its wake.[24] Among other things, the Dodd-Frank Act established the Bureau to provide "a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace."[25]

---

17. Levitin, *supra* note 12, at 332–33 (noting that some regulators "receive the majority of their budgets from chartering fees, rather than Congressional appropriations" and providing an example of a "regulatory race to the bottom" over state usury laws).

18. S. REP. NO. 111-176, at 168 (2010).

19. *See* Schooner, *supra* note 13, at 46.

20. For example, Elizabeth Warren, then a professor at Harvard Law School, called for the creation of a Financial Product Safety Commission in the summer of 2007. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/5EZ2-2BMP]; *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008). A few years earlier, Heidi Mandanis Schooner argued that bank regulators should not be responsible for consumer protection. *See* Schooner, *supra* note 13, at 83.

21. *See* Warren, *supra* note 20.

22. *See* Martin Feldstein, *The Global Impact of American's Housing Crisis*, PROJECT SYNDICATE (Aug. 2009), https://www.nber.org/feldstein/projectsyndicate082009.pdf [https://perma.cc/J6X6-N5WS]. *See generally* Levitin, *supra* note 12 (discussing events that led to the financial crisis and, in turn, to the subsequent creation of the Bureau).

23. *See, e.g.*, *Fact Sheet: Mortgage Servicing Statement*, U.S. DEP'T HUD, https://www.hud.gov/mortgageservicingsettlement/fact-sheet [https://perma.cc/D6YH-FF2Z] (detailing some of the most widespread procedural abuses in the wake of the global financial crisis).

24. *See* Levitin, *supra* note 12, at 322.

25. 12 U.S.C. § 5491(a) (2012); *The Bureau*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ [https://perma.cc/WK65-CKFF].

The creation of the Bureau was, and remains, extremely controversial. Opponents of the Bureau have raised a variety of concerns, including that the aggregate costs of regulation will trickle down to consumers and put undue pressure on small financial institutions, and that separating financial protection from "safety-and-soundness" could upset the balance between these two concerns.[26] But the leadership structure of the Bureau has raised the most fervent objections.[27] The Bureau was designed to be independent from regulatory capture and other political pressures.[28] It is not subject to congressional appropriations.[29] Its single director is appointed directly by the President, rather than a bipartisan committee, and can be removed only for cause.[30] Cases have challenged this structure based on separation-of-powers concerns[31] and, at the time of publication, the United States Supreme Court is poised to rule on whether this leadership structure is constitutional.[32] The balance of this Article proceeds on the assumption that, if the Court holds that the leadership structure of the Bureau is unconstitutional, it will sever the offending provisions from the remainder of the statute.[33] If that is the case, then the Court's holding would not undermine the contributions of this Article. If the Court takes a more aggressive approach, and disposes of the Bureau completely, then our Article can serve as a blueprint for the development of future consumer protection agencies.

B. *The Scope of the Bureau's Authority*

In the revised regulatory landscape, the Bureau regulates almost all consumer financial products and services markets.[34] Broadly, the Bureau has the authority to regulate "covered persons," defined as those who directly or indirectly offer or provide a consumer financial product or

---

26. *See* Levitin, *supra* note 12, at 336–38 (collecting examples of opposition to the Bureau).

27. *See, e.g.*, *id.* at 337–38.

28. *Id.* at 337, 340.

29. *Id.*; *cf.* 12 U.S.C. § 5497(a) (providing for the funding of the Bureau).

30. Levitin, *supra* note 12, at 340; *see* 12 U.S.C. § 5491(b)(2), (c)(1)–(3).

31. *Compare, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 80 (D.C. Cir. 2018) (en banc) (holding the CFPB's leadership structure constitutional), *with* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018)) (holding the CFPB's leadership structure unconstitutional).

32. Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 427 (2019).

33. The Dodd-Frank Act has a severability clause, see 12 U.S.C. § 5302, which expressly states that any provision found unconstitutional may be severed from the statute. The CFPB has filed a brief advocating for the severability in the pending U.S. Supreme Court case. *See* Brief of Respondent Supporting Vacatur at 46–48, No. 19-7, Seila Law, LLC, v. Consumer Fin. Prot. Bureau at 46–48, 2019 WL 6727094 (Dec. 9, 2019).

34. *See generally* AUCHTERLONIE & SICKLER, *supra* note 1 (discussing the Bureau's authority in detail).

service.[35] In particular, it is the primary regulator for banking institutions with more than $10 billion in total assets and nonbank covered persons that offer or provide consumer financial products or services.[36]

The Bureau's mission is to "implement and . . . enforce Federal consumer financial law consistently" to ensure consumers have access to "fair, transparent, and competitive" markets for consumer financial products and services.[37] To that end, the Bureau has sweeping authority to regulate a majority of entities involved in the consumer financial services industry, and, as of July 2016, Bureau enforcement activity resulted in "over $11.4 billion in relief for more than 25 million consumers harmed by illegal practices."[38]

While the Bureau implements and enforces longstanding federal consumer credit laws, including the Truth in Lending Act (TILA),[39] the Real Estate Settlement Procedures Act (RESPA),[40] the Fair Debt Collection Practices Act (FDCPA),[41] and the Fair Credit Reporting Act (FCRA),[42] the agency also has additional regulatory tools at its disposal. It can identify and prohibit unfair, deceptive, or abusive acts or practices, commonly known as "UDAAPs."[43] The Bureau also has on-site supervision and examination authority, which allows it to monitor regulated entities' compliance with federal consumer financial laws and identify emergent business practices that risk harm to consumers.[44]

---

35. *See* 12 U.S.C. § 5481(6) (2012). This authority extends to "related persons," meaning those who are in management or materially participate in the affairs of a covered person. *Id.* § 5481(25). This authority also extends to "service providers," meaning those who provide material services to covered persons. *Id.* § 5481(26). Covered persons, related persons, and service providers are all prohibited from violating federal consumer financial law.

36. *See id.* §§ 5512, 5514–5515, 5563, 5564.

37. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, § 1021(a), 124 Stat. 1376, 1979–80 (codified as amended at 12 U.S.C. § 5511(a)). The CFPA's preamble also states that among its purposes is "to protect consumers from abusive financial services practices." *Id.* at 1376.

38. *Consumer Financial Protection Bureau: Enforcing Federal Consumer Protection Laws*, CONSUMER FIN. PROTECTION BUREAU (July 2016), https://files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf [https://perma.cc/862P-TSV7].

39. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2012)).

40. Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2012)).

41. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o).

42. Pub. L. No. 91-508, tit. VI, 84 Stat. 1114, 1128 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x).

43. 12 U.S.C. § 5536(a) (making it unlawful for any person who offers or provides consumer financial products or services (or their service providers) to engage in UDAAPs). The Bureau also has authority to prescribe rules and bring enforcement actions to prohibit UDAAPs. *See id.* § 5531(b).

44. *See id.* § 5531(a).

The Bureau's authority to regulate consumer financial matters derives from three broad categories of law, collectively defined as "federal consumer financial law" under the Consumer Financial Protection Act of 2010 (CFPA).[45] Federal consumer financial law[46] includes the "enumerated consumer laws," which are eighteen federal consumer protection statutes identified in the CFPA and listed in Table 2,[47] specific provisions of the CFPA,[48] and the authorities transferred under subtitles F and H of the CFPA.[49] These sources of law are described in more detail in Table 1. The enumerated consumer laws are listed in Table 2.

45. The Consumer Financial Protection Act appears as Title X of the Dodd-Frank Act. *See* Pub. L. No. 111-203, tit. X, § 1011, 124 Stat. 1376, 1964-65 (2010) (codified at 12 U.S.C. § 5491).

46. *See* 12 U.S.C. § 5481(14) ("The term 'Federal consumer financial law' means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H." (footnotes omitted)).

47. *Id.* § 5481(12). These laws, and their implementing regulations, regulate specific activities, products, and services in the consumer financial services market, including extensions of consumer credit of all kinds, debt collection practices, debit card transfers, overdraft services, consumer leases, mortgage origination and appraisals, real estate settlement practices, mortgage servicing, privacy, and credit reporting. *See id.*

48. Sometimes referred to as the Bureau's "original" or "organic" authority. *See* Levitin, *supra* note 12, at 344.

49. Subtitles F and H of the CFPA refer respectively to the transfer of consumer financial protection functions to the Bureau and amendments to various federal statutes. *See* Consumer Financial Protection Act, 12 U.S.C. §§ 1061–1067, 1081–1100.

Table 1: Sources of Bureau Authority

CONSUMER FINANCIAL PROTECTION ACT (CFPA)

- Contains the substantive provisions of Title X of the Dodd-Frank Act
- Delineates the scope of the Bureau's rulemaking, supervisory, and enforcement authority
- Authorizes the Bureau to create rules that ban UDAAPs

ENUMERATED CONSUMER LAWS

- Eighteen federal consumer protection statutes identified in the CFPA and listed in Table 3
- The Bureau has authority to create administrative rules, enforce these statutes, and supervise for compliance

TRANSFERRED AUTHORITIES

- CFPA Subtitle F – transfers authority to the Bureau from other federal regulators, including the Comptroller of the Currency, Office of Thrift Supervision, and Federal Deposit Insurance Corporation.
- CFPA Subtitle H – refers mostly to conforming amendments to various federal statutes, such as TILA, FDCPA, among others

Table 2: Enumerated Consumer Laws

Alternative Mortgage Transaction Parity Act of 1982 (AMTPA)[50]	Consumer Leasing Act of 1976 (CLA)[51]	Electronic Fund Transfer Act (EFTA),[52] with the exception of Section 920
Equal Credit Opportunity Act (ECOA)[53]	Fair Credit Billing Act (FCBA)[54]	Fair Credit Reporting Act (FCRA),[55] (with some exceptions)
Home Owners Protection Act of 1998 (HPA)[56]	Fair Debt Collection Practices Act (FDCPA)[57]	Federal Deposit Insurance Act (FDIA)[58] (only subsections (b) through (f) of Section 43)
Gramm-Leach-Bliley Act (GLBA)[59] (only sections 502-509)	Home Mortgage Disclosure Act of 1975 (HMDA)[60]	Home Ownership and Equity Protection Act of 1994 (HOEPA)[61]
Real Estate Settlement Procedures Act of 1974 (RESPA)[62]	Secure and Fair Enforcement (S.A.F.E.) for Mortgage Licensing Act of 2008[63]	Truth in Lending Act (TILA)[64]
Truth in Savings Act (TISA)[65]	Interstate Land Sales Full Disclosure Act[66]	Military Lending Act (MLA)[67]

50. Pub. L. No. 97-320, tit. VIII, 96 Stat. 1469, 1545–48 (codified as amended at 12 U.S.C. §§ 3801–3806).
51. Pub. L. No. 94-240, 90 Stat. 257 (codified as amended in scattered sections of 15 U.S.C.).
52. Pub. L. No. 95-630, tit. XX, 92 Stat. 3728 (1978) (codified as amended at 15 U.S.C. §§ 1693–1693r (2012)).
53. Pub. L. No. 93-495, tit. V, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691, 1691a–1691c, 1691d–1691e).
54. Pub. L. No. 93-495, tit. III, 88 Stat. 1511 (1974) (codified as amended at 15 U.S.C. §§ 1601, 1602, 1610, 1631, 1632, 1637, 1666, 1666a–1666j).
55. 15 U.S.C. § 1681.
56. Pub. L. No. 105-216, 112 Stat. 897 (codified as amended at 12 U.S.C. §§ 4901–4910 (2012)).
57. 15 U.S.C. §§ 1692–1692p.
58. Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. §§ 1811–1831bb).
59. Pub. L. No. 106-102, 113 Stat. 1338, 1340 (1999) (codified as amended in scattered sections of 12 & 15 U.S.C.).
60. Pub. L. No. 94-200, 89 Stat. 1125 (codified as amended at 12 U.S.C. §§ 2801–2810).
61. Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended in scattered sections of 15 U.S.C.).
62. Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601–2617).
63. Pub. L. No. 110-289, 122 Stat. 2810 (codified as amended at 12 U.S.C. §§ 5101–5117).
64. *See* 15 U.S.C. §§ 1601–1667f.
65. Pub. L. No. 102-242, 105 Stat. 2334 (1991) (codified as amended at 12 U.S.C. §§ 4301–4313).
66. Pub. L. No. 90–448, 82 Stat. 590 (1968) (codified as amended at 15 U.S.C. §§ 1701–1720 (2012)).
67. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083, 2266 (codified at 10 U.S.C. § 987(b) (2012)).

II. BUREAU REGULATION AND ITS SPILLOVER EFFECTS IN BANKRUPTCY

To date, the Bureau has exercised its authority in consumer bankruptcy sparingly, only occasionally taking action to directly regulate conduct that occurs within the bankruptcy system. More often, the agency exercises its authority indirectly, in ways that have ripple effects in the consumer bankruptcy system. The following sections detail the full scope of the Bureau's authority—rulemaking, supervisory, and enforcement—and catalog the history of Bureau regulatory activities that have directly or indirectly affected consumer bankruptcy. Table 3 details the scope of the Bureau's authority.

A. *The Bureau's Rulemaking Authority*

1. In General

The Bureau has exclusive authority to prescribe rules and issue orders and guidance to administer, implement, and enforce federal consumer financial law.[68] The Bureau can prescribe rules about many topics, including UDAAPs,[69] disclosure,[70] nonbank supervision,[71] nonbank registration,[72] pre-dispute arbitration,[73] and reverse mortgages.[74] The Bureau can also promulgate rules that "exempt any class of covered

---

68. *See* 12 U.S.C. § 5512(a), (b)(1). If both the Bureau and another agency are authorized to prescribe regulations under a provision of federal consumer financial law, the Bureau has exclusive rulemaking authority. *Id.* § 5512(b)(4)(A).

69. *Id.* § 5531(b) (giving the Bureau the power to prescribe rules identifying UDAAPs); *see id.* § 5536(a)(1) (prohibiting UDAAPs).

70. *Id.* § 5532(a).

> The Bureau may prescribe [disclosure] rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service . . . .

Id. These disclosure rules may include model forms, the use of which constitutes a "safe harbor" for covered persons. *Id.* § 5532(b), (d).

71. *Id.* § 5514(a)(1). The Bureau may prescribe rules, in consultation with state agencies, to facilitate supervision of nonbank covered persons, including rules to ensure such entities are legitimate and able to perform their consumer obligations. *Id.* § 5514(b)(7).

72. *Id.* § 5512(c)(7). In consultation with state agencies, the Bureau may prescribe rules requiring registration of certain nonbanks other than insured depository institutions and related persons. *Id.*

73. *Id.* § 5518(b). The Bureau may prescribe rules prohibiting or restricting pre-dispute arbitration agreements between covered persons and consumers upon finding that such rules are "in the public interest and for the protection of consumers." *Id.*

74. *Id.* § 5602(b)(1). The Bureau may identify and preclude unlawful, unfair, deceptive, or abusive acts or practices in connection with reverse mortgage transactions or the offering of reverse mortgages. *Id.* § 5602(b)(2).

persons, service providers, or consumer financial products or services, from any provision" of the CFPA or any rule issued thereunder, "as the Bureau determines necessary or appropriate" to carry out the statute's objectives.[75]

The Dodd-Frank Act defines the scope of the Bureau's "original" rulemaking authority to cover nearly all consumer financial products and services, including loan extensions and servicing, leases, deposits, payments, debt collection, and financial advisory services.[76] But while the Bureau's rulemaking authority is broad, it is not without limits. Each enumerated consumer law defines the scope of the Bureau's rulemaking authority thereunder.[77] In addition, the Bureau is subject to a number of procedural limitations that require it to engage in a cost-benefit analysis,[78] consult with prudential banking regulators,[79] comply with the Administrative Procedure Act (APA)[80] and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[81] and conduct periodic reviews of its rules.[82] Finally, the Financial Stability Oversight Council (FSOC) has the power to veto a final Bureau rule if it determines that the rule "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."[83]

---

75. *Id.* § 5512(b)(3)(A). The Bureau must take into consideration statutorily enumerated factors in exercising this exemption authority, such as "the total assets of the class of covered persons," the volume of consumer financial transactions that the covered person conducts, and existing provisions of applicable law. *Id.* § 5512(b)(3)(B)(i).

76. *See id.* § 5481(15)(A).

77. *See supra* notes 50–67 and accompanying text.

78. 12 U.S.C. § 5512(b)(2)(A).

79. *Id.* § 5512(b)(2)(B). The Bureau must consult with the appropriate prudential regulator before proposing a rule and during the comment process. *Id.* If a prudential regulator objects in writing to a proposed rule, the Bureau's final order must describe the objection and the basis for the Bureau's decision about the objection. *Id.* § 5512(b)(2)(C).

80. Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

81. Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.); *see, e.g.*, 5 U.S.C. §§ 602–604 (requiring the Bureau to consider the economic impact of its rules on small businesses and evaluate alternatives that would minimize any burden while accomplishing the rule's objectives).

82. 12 U.S.C. § 5512(d)(1). The Bureau must review every "significant" rule or order within at least five years of its issuance. *Id.* § 5512(d)(1)–(2). The statute does not define the term "significant," apparently leaving that matter to the Bureau's discretion.

83. *Id.* § 5513(a). FSOC, a Dodd-Frank Act creation, is composed of 15 federal and state financial regulators (10 with voting power) charged with identifying, responding to, and managing risk to the U.S. financial system. *See id.* § 5322(a). The FSOC's veto authority requires a two-thirds majority vote. *Id.* § 5323(a)(1).

2. In Bankruptcy

To date, the Bureau's bankruptcy-related rulemaking activity has been limited to addressing mortgage servicers' interactions with debtors in bankruptcy. When a debtor files for bankruptcy relief, the automatic stay requires creditors to halt any ongoing collection activity.[84] But even so, many debtors continue to interact with their mortgage servicers over the course of the bankruptcy case. Most notably, debtors who file for chapter 13 bankruptcy can cure any arrears on their mortgage payments and continue paying their mortgages on a payment plan over the course of their case.[85] Depending on the jurisdiction, debtors make these payments through a chapter 13 trustee or directly to the creditor.[86] Because many debtors in bankruptcy continue to pay their mortgages over the course of a bankruptcy case, the Bureau's regulations on mortgage servicer conduct are directly relevant to the consumer bankruptcy process.

TILA and its corresponding administrative rules, Regulation Z, regulate the disclosure of loan terms in extending and servicing consumer credit.[87] In 2010, Congress amended TILA to require mortgage servicers to provide periodic statements to debtors,[88] and the Bureau promulgated rules to implement this requirement.[89] An earlier version of these rules exempted debtors in bankruptcy from the periodic-statement requirement, permitting (but not requiring) servicers to send periodic

84. *See* 11 U.S.C. § 362(a) (2012). Creditors face steep penalties if they continue to collect, or seek to foreclose, without the authority of the court. *See id.* § 362(k).

85. *See* Gordon Bermant & Jean Braucher, *Making Post-Petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law, Policy*, 80 AM. BANKR. L.J. 261, 261–62 (2006).

86. *Id.* ("Some courts and chapter 13 trustees still permit chapter 13 debtors to make regular mortgage payments directly, while in some courts, a standing order requires trustees to make conduit payments."). Debtors filing for chapter 7 bankruptcy have fewer options to save their homes, but some jurisdictions will permit the mortgage to "ride through" the bankruptcy if the debtor continues to pay the monthly amounts due. *See, e.g.*, *In re* Law, 421 B.R. 735, 737 (Bankr. W.D. Pa. 2010); *In re* Caraballo, 386 B.R. 398, 400–01 (Bankr. D. Conn. 2008) (noting that, although the Bankruptcy Abuse Protection and Consumer Protection Act abrogated the "ride-through" option for personal property, debtors can still choose "ride-through" with respect to real property).

87. 12 C.F.R. § 1026 (2019); *see* 15 U.S.C. § 1604(a) (2012) (authorizing the Bureau to prescribe regulations to carry out the purposes of TILA).

88. *See* Mortgage Reform and Anti-Predatory Lending Act, Pub. L. No. 111–203, tit. XIV, § 1400, 124 Stat. 2136 (2010). The Dodd-Frank Act amended TILA to require that a creditor, assignee, or servicer of any residential mortgage loan—a closed-end credit transaction secured by a dwelling—provide a periodic statement to the borrower for each billing cycle. *See id.* § 1420(1). The Dodd-Frank Act required the Federal Reserve Board and, subsequently, the Bureau to prescribe standard form(s) for the required disclosure, taking into account that the statements might be transmitted in writing or electronically. *See id* § 1420(2).

89. *See* 12 C.F.R. § 1026.41(a)–(d).

mortgage statements to debtors in bankruptcy.[90] But the most recent iteration requires mortgage servicers to send statements with bankruptcy-specific modifications to debtors in bankruptcy.[91]

In the process of promulgating this new rule, the Bureau considered comments from the United States Trustee Program (USTP), industry, and consumer advocacy groups.[92] While the USTP and consumer advocacy groups strongly supported requiring servicers to provide periodic statements to consumers in bankruptcy, some industry commenters argued that borrowers in bankruptcy should be exempted from the rule based on the complexities of calculating pre-petition arrearages and potential conflicts with the Bankruptcy Code.[93] The Bureau concluded that requiring mortgage servicers to send periodic statements to debtors in bankruptcy was appropriate, notwithstanding the complexity, and did not conflict with the Bankruptcy Code.[94] The Bureau crafted bankruptcy-specific modifications to servicers' requirements, which help servicers communicate with debtors without violating the automatic stay and discharge injunction.[95]

---

90. *See* Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10,901, 10,966 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1026) (acknowledging industry's concern that the automatic stay conflicts with the periodic statement requirement); Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 62,993, 63,000–06 (Oct. 23, 2013) (to be codified at 12 C.F.R. pt. 1024, 1026) (promulgating an interim rule exempting servicers from sending periodic statements to residential mortgage consumers who have filed for bankruptcy pending further study of the interaction of bankruptcy law and the periodic statements requirement).

91. *See* Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 83 Fed. Reg. 10,553, 10,553–54 (Mar. 12, 2018) (to be codified at 12 C.F.R. pt. 1026). This final iteration of the rule provides that upon a triggering event (for example, if the borrower enters bankruptcy, personal liability is discharged, or if the borrower exits bankruptcy), the servicer is exempt from providing the next periodic statement or coupon book that would otherwise be required, regardless of when in the billing cycle the triggering event occurs. 12 C.F.R. § 1026.41(e)(5)(iv). As previously drafted, the exemption applied for the next periodic statement or coupon book only if the payment due date for that ensuing billing cycle was 14 days or less after the triggering event. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160, 72,324–26 (Oct. 19, 2016) (to be codified at 12 C.F.R. pt. 1024, 1026).

92. *See generally* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 19, 2016) (to be codified at 12 C.F.R. pt. 1024, 1026).

93. *Id.* at 72,315.

94. *See id.* at 72,319–21 (noting also that the USTP "did not express concerns" that the periodic statement requirement as proposed would violate the automatic stay).

95. The bankruptcy-specific modifications to periodic statements include omitting certain otherwise-required disclosures—such as late payment fees, length of delinquency, the potential risks of failing to cure a delinquency—and the addition of other new disclosures for borrowers who have filed bankruptcy—such as pre-petition arrearage, etc. *See generally* Amendments to the

The Bureau also promulgated new regulations that require creditors to give notice of rate changes to borrowers holding adjustable rate mortgages (ARMs). The regulations generally require creditors to notice rate changes between 210 and 240 days before the first rate adjustment, and between 60 and 120 days for subsequent rate adjustments.[96] Meanwhile, the Bankruptcy Rules require creditors to give debtors notice of payment changes within 21 days before the payments at the adjusted rate are due.[97] During the notice and comment period, the Bureau received a comment suggesting that borrowers in bankruptcy should be excepted from the new ARM notice regulations because the regulations conflicted with the 21-day notice present in the Bankruptcy Rules.[98] The Bureau disagreed, noting that the earlier notice requirements "enhance[] consumer protection by providing these consumers with additional time to adjust to an increase in their mortgage payments."[99]

The Bureau's effort to adjust for the bankruptcy implications of its mortgage servicing regulations represents a policy shift in consumer financial regulation. Before Dodd-Frank, most mortgage servicing regulations avoided potential conflicts with bankruptcy by crafting expansive exceptions for creditor communications with debtors in bankruptcy.[100] But as discussed elsewhere in this Article, such broad exceptions can undermine the value of consumer protection for debtors, a particularly vulnerable class of consumers. These examples illustrate how the Bureau now strives to harmonize its goals—here, improving consumers' access to information—while complying with the statutory and procedural limitations supplied by bankruptcy law.

B. *The Bureau's Supervision & Examination Authority*

1. In General

The Bureau has broad supervisory authority over banking institutions with assets over $10 billion[101] as well as nonbank mortgage originators

---

2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160. There are also different disclosures required depending on whether the borrower filed a chapter 7 or 13 case. *Id.*

96. 12 C.F.R. § 1026.20(c), (d).

97. FED. R. BANKR. P. 3002.1(b).

98. Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10,901, 10,923 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1026).

99. *Id.*

100. *See* John Rao, *New Servicing Regulations Adopt Sensible Approach*, AM. BANKR. INST. J., May 2013, at 16, 16.

101. 12 U.S.C. § 5515(a) (2012). In measuring the assets of a banking institution, this provision includes affiliates. *Id.*

and servicers,[102] payday lenders,[103] and private student lenders of all sizes.[104] It also supervises larger participants of other consumer financial markets, including consumer debt collection businesses,[105] consumer reporting agencies,[106] student loan servicers,[107] international money transfers,[108] and automobile finance companies.[109]

The Bureau conducts its supervisory activities using an examination process that emphasizes compliance and risk monitoring.[110] Most examinations focus on the quality of the institution's compliance management systems, which should be designed to prevent violations and ensure appropriate self-monitoring, correction, and remediation where violations have occurred.[111] The Bureau also uses examination to detect emergent practices and assess risks of harm to consumers and markets.[112]

The Bureau publishes on its website a detailed Supervision and Examination Manual (Examination Manual) that functions as a guide for examiners and regulated entities.[113] This manual exceeds 1,500 pages and includes product- and statute-based examination guides.[114] Although it is designed for use by the Bureau's examiners, it also serves as a blueprint for regulated entities to measure their compliance.

Although the examination process is confidential,[115] the Bureau periodically publishes on its website Supervisory Highlights, which

102. *Id.* § 5514(a)(1)(A).

103. *Id.* § 5514(a)(1)(E).

104. *Id.* § 5514(a)(1)(D).

105. 12 C.F.R. § 1090.105(b).

106. *Id.* § 1090.104(b).

107. *Id.* § 1090.106(b).

108. *Id.* § 1090.107.

109. *Id.* § 1090.108.

110. *See* 12 U.S.C. §§ 5514(b)(1)(A)–(B), 5515(b)(1)(A)–(B) (2012).

111. The Bureau has an internal "playbook" that explains the examination process, including how decisions are made, who makes them, and how information is evaluated. Letter from Raynell D. Lazier, FOIA Manager, Consumer Fin. Prot. Bureau, to Jonathan Pompan, Venable LLP (Mar. 31, 2017), https://connect.venable.com/13/449/uploads/cfpb-examination-playbook-3-31-2017.pdf [https://perma.cc/N6GK-JSZ9]. Venable LLP attorneys obtained a copy of this playbook through a Freedom of Information Act Request. *Id.* For an extensive discussion of the Bureau's examination process, see generally Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 58 ARIZ. L. REV. 33 (2016).

112. 12 U.S.C. §§ 5514(a)–(b), 5515(b)(1), 5516.

113. *See generally* CONSUMER FIN. PROT. BUREAU, SUPERVISION AND EXAMINATION MANUAL (2012), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf. [https://perma.cc/CJT2-68CB].

114. *See id.* The manuals for individual products and services and statutes are here: *Supervision and Examinations*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/ [https://perma.cc/F2EQ-5WXB].

115. 12 C.F.R. §§ 1070.2(f), 1070.40–.47 (2019) (addressing the confidentiality of supervision).

report important examination findings to help the industry identify marketplace risks and ensure compliance.[116]

2. In Bankruptcy

The Bureau has identified several high-risk markets as priorities for examination, including mortgage servicing, third-party debt collection, credit reporting, and payment processing.[117] These markets have significant overlap in consumer bankruptcy cases.[118] The following examples explain how the Bureau's supervision of these areas touches bankruptcy-related activities. Although the full details of the Bureau's supervision are not publicly available, these overlaps show that Bureau examiners are well positioned to identify behavior that might pose a risk to the consumer bankruptcy process.

a. Mortgage Servicing Oversight

As noted above, debtors often continue to pay their mortgage obligations over the course of a pending bankruptcy case.[119] As such, mortgage creditors must build bankruptcy compliance into their operations. This task can be onerous, as the bankruptcy process often alters both the status of a debtor's loan and the schedule and amount of future payments.[120] In particular, chapter 13 bankruptcy permits debtors to cure home mortgage arrearages and continue paying their mortgages pursuant to the terms of the chapter 13 plan.[121] Mortgage creditors must therefore be attuned to court orders and plan provisions, which supplant any pre-bankruptcy accounting records that the servicer maintained.[122] Mortgage creditors must also comply with a variety of additional Bankruptcy Code provisions and procedural rules, including taking care not to violate the automatic stay, and disclosing changes in payments or other fees and amounts due.

---

116. *See Supervisory Highlights*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/ [https://perma.cc/MS88-JY83].

117. *See id.*

118. *See id.*; *supra* notes 101–21 and accompanying text.

119. *See supra* note 86 and accompanying text.

120. *But see* John Rao, *Servicing of Home Mortgages in Bankruptcy: When Worlds Need Not Collide*, AM. BANKR. INST. J., Feb. 2009, at 1, 1 ("While there are some unique payment application issues that arise when a mortgage default is cured in a chapter 13 case, even these are similar to servicers' handling of payments under nonbankruptcy repayment and modification agreements.").

121. *See* 11 U.S.C. § 1322(c) (2012) (detailing a statutory right to cure).

122. If mortgage creditors fail to pay attention to these issues, they risk violating not only the Bankruptcy Code, but RESPA as well. *See* Rao, *supra* note 120, at 1.

The Bureau's examination manual for mortgage servicing makes several express references to bankruptcy.[123] For example, the manual directs examiners to obtain information about whether mortgage servicers have internal policies and procedures that identify accounts as being active in bankruptcy, in order to ensure that servicers comply with bankruptcy laws and procedural rules.[124] It also includes provisions that cover chapter 13 notice of payment changes and other fees and amounts due.[125] Finally, the manual requires examiners to obtain information about whether and how servicers apply payments received from consumers or bankruptcy trustees.[126] To date, this supervision has uncovered significant payment processing non-compliance in bankruptcy cases affecting borrowers in bankruptcy, leading the Bureau to commence an enforcement action against the nation's largest nonbank mortgage loan servicer.[127]

b. Debt Collection Oversight

Consumer debt is regularly collected by entities other than the creditor that originated the transaction. Creditors often outsource collection to third-party debt collection agencies or sell past-due debts to debt buyers.[128] When debts are assigned, debt collectors need several pieces of information in order to comply with the bankruptcy process. For example, debt collectors should know if a debt is in bankruptcy or has been discharged in bankruptcy.[129] They also should be able to determine whether the statute of limitations has run. As discussed in more detail below, rampant failures to provide sufficient information with the assignments of debts have led to significant problems in consumer bankruptcy cases.[130]

The Bureau has authority to supervise larger participants in the debt collection market, defined as any entity that collects more than $10

---

123. *See* CONSUMER FIN. PROT. BUREAU, EXAMINATION PROCEDURES: MORTGAGE SERVICING 23–24 (2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/11.5_Mortgage_Servicing_Exam_Procedures_June_2016.pdf [https://perma.cc/PYU8-FKGL].

124. *See id.* at 23.

125. *See id.*

126. *See id.* at 24.

127. We discuss this case in more detail below. *See infra* notes 177–180 and accompanying text.

128. *See generally* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT-BUYING INDUSTRY (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://perma.cc/J42Y-P5XM] (detailing the scope of the debt-buying industry).

129. Some debt buyers focus their activity on collecting debts in bankruptcy. *See id.* at 18.

130. *See id.* at 29 (discussing rampant failure in documentation accompanying sold debt in general). As discussed below, the collection of time-barred debt in consumer bankruptcy has received a great deal of attention in recent years.

million annually.[131] Thus, collection agencies, debt buyers, and attorneys earning more than $10 million in annual receipts from collection-related activities on consumer financial products and services are subject to the Bureau's examination process.[132] The Bureau's examination manual for debt collection (Debt Collection Manual) focuses on ensuring that these "larger participant" debt collectors have compliance management systems in place to prevent specific violations, and directs examiners to inquire and obtain information about a range of debt collection issues that are relevant to bankruptcy.[133] For example, the Debt Collection Manual directs the examiner to determine whether a supervised entity has policies and procedures in place to identify and properly handle time-barred debt.[134] Related to debt sellers and buyers, the Debt Collection Manual directs examiners to inquire whether a seller conveys to the buyer sufficient and accurate information about the transferred accounts.[135]

The Debt Collection Manual also wraps in the Bureau's official guidance on debt-collection UDAAPs.[136] That guidance states that certain practices that would violate the FDCPA would likewise violate the UDAAP ban when creditors not subject to the FDCPA commit them.[137] Examples include collecting debts or any additional debt-related amounts (such as interest, fees, and charges) that aren't "expressly authorized by the agreement creating the debt or permitted by law," failing to timely or properly credit a consumer's account with payments, or "[f]alsely representing the character, amount, or legal status of the debt."[138]

---

131. 12 C.F.R. § 1090.105 (2019).

132. In 2012, the Bureau estimated that 175 firms representing 63% of industry revenues would fall within the scope of the rule. *See CFPB Proposes Rule to Supervise Larger Participants in Consumer Debt Collection and Consumer Reporting Markets*, CONSUMER FIN. PROTECTION BUREAU (Feb. 16, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-to-supervise-larger-participants-in-consumer-debt-collection-and-consumer-reporting-markets-2/ [https://perma.cc/382C-C4HC].

133. *See* Consumer Fin. Prot. Bureau, *Examination Procedures: Debt Collection*, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201210_cfpb_debt-collection-examination-procedures.pdf [https://perma.cc/SL43-JLZC]. More specifically, the Debt Collection Manual directs examiners to determine whether the entity sues or threatens to sue on such debt, demands payment on such debt through litigation, and what representations, if any, the entity makes in its written and oral communications with consumers regarding the time-barred nature of the debt and its ability to sue on the debt. *Id.*

134. *See id.* at 29.

135. *See id.* at 8–9.

136. *See generally* CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf [https://perma.cc/AR98-328V].

137. *See id.* at 2.

138. *See id.* at 5.

Although the full scope of the Bureau's bankruptcy-related examination findings are confidential, recent supervisory highlights shed some light on the fruits of the Bureau's supervision over bankruptcy matters. One Supervisory Highlights reported that Bureau examiners found that a debt seller sold thousands of dollars in debt accounts with improper information due to widespread coding errors.[139] Among the consequences of the coding errors was the failure to note that the accounts were in bankruptcy, which undermined the debt buyer's ability to comply with the Bankruptcy Code.[140] The examiners determined this practice was an "unfair" act or practice under the UDAAP.[141]

Multiple issues of Supervisory Highlights indicated that supervised entities inaccurately told borrowers that student loans are not dischargeable in bankruptcy.[142] The Bankruptcy Code provides that certain student loans may be dischargeable in bankruptcy if the debtor demonstrates that repayment would impose an undue hardship, a standard that is a matter of case law development.[143] Moreover, a number of courts have held that the Code exempts certain for-profit student loans from the scope of nondischargeability.[144] Examiners concluded that the inaccurate statements were deceptive because they may mislead struggling borrowers to conclude that bankruptcy is not a feasible choice.[145]

---

139. *See* CONSUMER FIN. PROT. BUREAU, SUMMER SUPERVISORY HIGHLIGHTS 6–7 (2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf [https://perma.cc/5YPV-XE4J].

140. *See id.*

141. *Id.*

142. *See* CONSUMER FIN. PROT. BUREAU, FALL SUPERVISORY HIGHLIGHTS 23–24 (2015), https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf [https://perma.cc/7DAQ-QCJS]; CONSUMER FIN. PROT. BUREAU, FALL SUPERVISORY HIGHLIGHTS 17 (2014), https://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf [https://perma.cc/X289-DYWV].

143. *See* 11 U.S.C. § 523(a)(8) (2012); Brunner v. N.Y. Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

144. *See generally* Bruce, *Educational Benefit Discharge Litigation*, *supra* note 6 (collecting authority).

145. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 142, at 23–24.

c. Credit Reporting Oversight

Consumer bankruptcy intersects with credit reporting from the filing of a case to well after a debtor receives his or her discharge. The filing of a bankruptcy case is noted on the public records section of a debtor's credit report.[146] A credit report indicates any discharge received for the bankruptcy and the accounts included in that discharge.[147] Finally, a bankruptcy notation remains on a credit report for seven years in chapter 13 cases and ten years for chapter 7 cases, measured from the filing date.[148]

Among the FCRA's primary goals are fairness and accuracy in credit reporting.[149] Inaccuracies in reporting bankruptcy-related matters implicate FCRA violations as well as automatic stay and discharge violations. In the past, creditors were notorious for failing to update consumer accounts with credit bureaus to reflect that debts had been discharged in bankruptcy.[150] Instead, they reported such debts as "charged off," late, or delinquent, or as having a balance due. Such a practice may violate FCRA[151] and bankruptcy's discharge injunction.[152]

146. 15 U.S.C. § 1681c(d)(1) (2012).

147. *See id.* § 1681c(a)(4).

148. *See id.* § 1681c(a)(1), (4).

149. *Id.* § 1681(a).

150. *See, e.g.*, Credit One Fin. v. Anderson (*In re* Anderson), 553 B.R. 221, 225 (S.D.N.Y. 2016) (alleging a failure to change status of debt from charged off to discharged in bankruptcy), *aff'd*, 884 F.3d 382 (2d Cir. 2018); Haynes v. Chase Bank USA, N.A. (*In re* Haynes), No. 11-23212 (RDD), 2014 WL 3608891 (Bankr. S.D.N.Y. July 22, 2014) (alleging a failure to correct credit reports to list debts as discharged in bankruptcy rather than charged off); Bruce v. Citigroup Inc. et al. (*In re* Bruce), Adv. No. 14-08224 (Bankr. S.D.N.Y.) (same); Complaint at 1–2, Belton v. GE Capital Consumer Lending, Inc. (*In re* Belton), No. 12-23037, 2015 WL 6163083 (Bankr. S.D.N.Y. Oct. 14, 2015) (alleging systemic practice of violating discharge injunction by attempting to collect discharged debt and by failing to furnish updated data to credit reporting agencies that such debts were discharged in bankruptcy), *vacated*, 2019 WL 1017293 (S.D.N.Y. Mar. 4, 2019); *see also* Jessica Silver-Greenberg, *Debts Canceled by Bankruptcy Still Mar Consumer Credit Scores*, N.Y. TIMES (Nov. 12, 2014, 9:45 PM) [hereinafter Silver-Greenberg, *Debts Canceled by Bankruptcy*], https://dealbook.nytimes.com/2014/11/12/debts-canceled-by-bankruptcy-still-mar-consumer-credit-scores/ [https://perma.cc/7UBU-SU5F]. Some of the defendant banks settled this litigation without admitting liability and agreed to ensure bankruptcy discharges were properly noted on credit reports. Jessica Silver-Greenberg, *Bank of America and JPMorgan Chase Agree to Erase Debts from Credit Reports After Bankruptcies*, N.Y. TIMES (May 7, 2015), https://www.nytimes.com/2015/05/08/business/dealbook/bank-of-america-and-jpmorgan-chase-agree-to-erase-debts-from-credit-reports-after-bankruptcies.html [https://perma.cc/Z4EZ-EJ39].

151. *See* 15 U.S.C. § 1681s-2(a).

152. 11 U.S.C. § 524(a)(2) (2012). A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." *Id.*

The Bureau's authority to supervise FCRA compliance is critical because individual consumers are limited in their ability to force creditors to correct inaccuracies.[153] First, consumers do not have an unqualified private right of action to enforce FCRA against creditors and other entities that furnish information to credit bureaus.[154] FCRA simply requires that these entities report accurate information to the credit bureaus, making updates or corrections as needed.[155] And the Bureau's FCRA regulations instruct furnishers to handle any direct consumer disputes.[156] But these duties—to report accurate information and respond to direct disputes—are enforced against furnishers exclusively through public regulators.[157] Second, some bankruptcy courts have been reluctant to conclude that the failure to update a credit report is a violation of the discharge injunction unless there is an additional showing that the purpose or effect of the failure to update is to collect the discharged debt, or that the failure to update negatively impacts on the debtor's ability to obtain credit, a job, or insurance.[158]

---

153. *See generally* Sickler, *Unfair Credit*, *supra* note 6 (discussing current challenges to the FCRA's enforcement regime and possible ways to restructure FCRA enforcement).

154. Consumers do not have a FCRA private right of action against a furnisher for reporting false information. 15 U.S.C. § 1681s-2(a) (enumerating furnishers' duties to report accurate information); *id.* § 1681s-2(c), (d). But they may sue a furnisher for the negligent or willful breach of its investigation obligations as long as they have first disputed information on their report with a credit bureau. *Id.* § 1681s-2(b); *id.* § 1681n (willfulness); *id.* § 1681o (negligence) (enumerating furnishers' duties to investigate reports of inaccuracies); *see also* Felts v. Wells Fargo Bank, N.A., 893 F.3d 1305, 1312 (11th Cir. 2018) (recognizing that consumers have a private right of action against furnishers for a violation of § 1681s–2(b), which requires furnishers to conduct an investigation following notice of a dispute); Chiang v. Verizon New England Inc., 595 F.3d 26, 36 (1st Cir. 2010). To maintain such a claim, a consumer must show facts that show the furnisher's investigation of disputed credit information was unreasonable. *See, e.g.*, Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 430–31 (4th Cir. 2004) (stating that FCRA requires a furnisher to conduct a reasonable investigation of its records to resolve disputes). In addition, consumers can enforce FCRA against the credit bureaus. *See, e.g.*, 15 U.S.C. §§ 1681i, 1681n, 1681o, 1681s-2; *see also* Sickler, *Unfair Credit*, *supra* note 6, at 238–42 (providing an example of the statute's flaws in this respect).

155. 15 U.S.C. § 1681s-2(a); *see also* Sickler, *Unfair Credit*, *supra* note 6, at 242–51.

156. 12 C.F.R. §§ 1022.40–43 (2019); *see also* Sickler, *Unfair Credit*, *supra* note 6, at 282–89.

157. *See supra* note 154 and accompanying text.

158. *See, e.g.*, *In re* Zine, 521 B.R. 31, 40 (Bankr. D. Mass. 2014); Giles v. James B. Nutter & Co. (*In re* Giles), 502 B.R. 892, 903 (Bankr. N.D. Ga. 2013); Montano v. First Light Fed. Credit Union (*In re* Montano), 488 B.R. 695, 711–12 (Bankr. D.N.M. 2013); Reeves v. Gateway Credit Card Plan (*In re* Reeves), 369 B.R. 338, 339 (Bankr. N.D. Ohio 2007); Bruno v. Peoples Nat'l Bank (*In re* Bruno), 356 B.R. 89, 92 (Bankr. W.D.N.Y. 2006); *In re* Goodfellow, 298 B.R. 358, 362 (Bankr. N.D. Iowa 2003); Mayer v. Huntington Nat'l Bank (*In re* Mayer), 254 B.R. 396, 398 (Bankr. N.D. Ohio 2000).

At least one issue of Supervisory Highlights flags a number of violations involving bankruptcy-related credit reporting.[159] First, examiners found that undisclosed creditors failed to provide investigation "result letters" to consumers in bankruptcy who had directly disputed information on their credit reports.[160] Due to a "system error," the letters were coded as barred by the automatic stay and not sent.[161] Second, examiners found that certain creditors provided consumer information to credit bureaus about a debtor's bankruptcy status "while knowing or having reasonable cause to believe that the information was inaccurate."[162] Finally, some creditors "failed to report accurate dates of first delinquency on accounts when consumers who had been delinquent filed for bankruptcy."[163]

d. Summary

The publicly available information on the Bureau's supervisory activity does not detail how closely examiners watch for bankruptcy non-compliance. It is clear, however, that the Bureau has the power to examine for bankruptcy-related misconduct, and that its examination activities have uncovered significant bankruptcy non-compliance to date. In Part IV, this Article considers how these examination efforts, combined with the Bureau's other information-gathering tools, could provide valuable information to the bankruptcy process.[164]

C. *The Bureau's Enforcement Authority*

1. In General

The Bureau has authority to enforce a variety of federal consumer financial laws[165] for banking institutions with assets over $10 billion[166] and nonbank covered persons.[167] The Bureau shares this latter authority

159. *See* CONSUMER FIN. PROT. BUREAU, WINTER SUPERVISORY HIGHLIGHTS 17–19 (2017), https://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf [https://perma.cc/UCT3-ZTQL].

160. *See id.* at 19–21.

161. *See id.*

162. *See id.* at 17–19.

163. *See id.* Specifically, when consumers filed for bankruptcy, one or more furnishers updated the date of first delinquency to reflect the date of bankruptcy filing, which is incorrect. *Id.*

164. *See infra* Part IV.

165. *See* 12 U.S.C. § 5564(a) (2012).

166. *See id.* § 5515(a)–(c).

167. *See id.* § 5514(a)–(c).

with the Federal Trade Commission, and the agencies divide the authority according to a memorandum of understanding.[168]

The Bureau exercises its enforcement authority through investigations,[169] administrative adjudications,[170] and civil litigation.[171] It can also negotiate and enter into administrative or civil court consent orders.[172] The Bureau has a wide range of remedies at its disposal, including rescission or reformation of contracts, refunds or returns of money or real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages, civil monetary penalties, and injunctive relief.[173] The CFPA permits civil monetary penalties,[174] which complement any relief available under the enumerated statutes. The Bureau can impose penalties up to $5,000 per day for simple violations, up to $25,000 per day for reckless violations, and up to a $1,000,000 per day for knowing violations.[175] When imposing penalties, the Bureau or a court must consider the defendant's size and financial resources, the seriousness of the violation(s), the severity of risk or harm to consumers, any history of violations, and other matters as justice requires.[176]

2. In Bankruptcy

On several occasions, the Bureau has exercised its enforcement authority to regulate mortgage servicers for bankruptcy-related conduct. For instance, the Bureau has twice sued a large nonbank mortgage servicer, Ocwen Financial Corporation, and its subsidiaries, for violations of federal consumer financial laws and consumer bankruptcy laws. The Bureau, forty-nine states, and the District of Columbia filed the first lawsuit in 2013, alleging that Ocwen violated the states' unfair and deceptive acts and practices laws and the CFPA, among other laws.[177] That lawsuit settled the same year, with Ocwen agreeing to implement internal policies and procedures to ensure compliance with bankruptcy law when filing proofs of claim, motions for relief from stay, and other

168. *See id.* § 5514(c)(3)(A). *See generally*, FED. TRADE COMM'N, MEMORANDUM OF UNDERSTANDING BETWEEN THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE FEDERAL TRADE COMMISSION (2012), https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf. [https://perma.cc/8XH9-T575].

169. 12 U.S.C. § 5562(a).

170. *Id.* § 5563. Alternatively, the Bureau may conduct an administrative adjudication before an administrative law judge under the Administrative Procedure Act. *See* 5 U.S.C. § 706 (2012).

171. 12 U.S.C. § 5564(a), (f).

172. *See id.*

173. *Id.* §§ 5564(a), 5565(a)(2).

174. *Id.* § 5565(c)(1).

175. *See id.* § 5565(c)(2). The penalties are not adjusted for inflation.

176. *See id.* § 5565(c)(3).

177. Complaint at 8, Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp., No. 1:13-cv-02025-RMC (D.D.C. Dec. 19, 2013).

documents.[178] More recently, the Bureau sued Ocwen again based on "substantial evidence" that Ocwen engaged in significant and systemic misconduct at nearly every stage of the mortgage servicing process, including improperly processing and applying payments for loans in bankruptcy.[179] The Bureau alleges that Ocwen's mortgage servicing platform was deficient in several ways that harmed consumer debtors.[180] This Article explains the Bureau's allegations against Ocwen in more detail in Part III.

Although this particular enforcement action remains pending, the Bureau's efforts illustrate its potential to serve as an adjunct regulator in consumer bankruptcy. The Bureau used its ongoing supervision of Ocwen's actions to identify business practices that harm debtors in the consumer bankruptcy system. It leveraged this information to launch an enforcement action targeting the illegal conduct. As indicated below, bankruptcy courts are largely limited to addressing conduct within the individual case as opposed to system-wide behavior.[181] Using the Bureau's enforcement powers to directly target a particular market actor's bankruptcy-related violations spares the use of bankruptcy resources to detect and remedy this behavior on a case-by-case basis.

Some of the Bureau's enforcement actions against debt sellers and debt buyers highlight the potential for indirect consumer bankruptcy effects. For example, the Bureau has settled enforcement actions against debt sellers with consent orders that regulate the assignment and transfer of charged-off debts that are sold to bulk debt buyers.[182] In one such case, the consent order settling the litigation required the defendant to accurately document the debt it sells and provide certain account documents such as the credit agreement and recent account statements.[183] The consent order also barred the defendant from selling debts if it cannot provide documentation, if consumers allege in writing that they do not owe the amount claimed, or if the account is within 150 days of the end of the statute of limitations.[184] The documentation and verification requirements may improve the quality of data accompanying the sale of

178. *See generally* Consent Judgment, *Ocwen Fin. Corp.*, No. 1:13-cv-02025-RMC (detailing various policies and procedures the settlement required Ocwen to implement).

179. *See* Complaint at 1, Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp., No. 9:17-CV-80495-KAM, 2017 WL 1408216 (S.D. Fla. Apr. 20, 2017).

180. *See id.* at 14–18.

181. *See infra* Part III.

182. *See generally, e.g.*, Consent Order, *In re* Citibank, N.A., No. 2016-CFPB-0003 (detailing the new procedures and requirements that must be followed as a result of statutory violations).

183. *Id.* at 10–11.

184. *Id.* at 12.

these debts, which should in turn improve debt buyers' ability to comply with bankruptcy law and applicable procedural rules.[185]

Additionally, the Bureau's actions against large-volume debt buyers, particularly Encore Capital Group and Portfolio Recovery Associates,[186] were resolved by consent orders that bar these creditors from suing or threatening to sue to collect on time-barred debt.[187] The order also bars creditors from sending demand letters on such debt unless they disclose to consumers that they can't sue to collect it.[188] Although the consent orders do not expressly mention bankruptcy, they are drafted in expansive terms that could encompass the collection of debts in bankruptcy. And as such, the consent orders might help address remedial gaps we have identified in other writings.[189]

---

185. The Federal Rules of Bankruptcy Procedure provide:

> (3) Claim Based on an Open-End or Revolving Consumer Credit Agreement.
>
> (A) When a claim is based on an open-end or revolving consumer credit agreement . . . a statement shall be filed with the proof of claim, including all of the following information that applies to the account: (i) the name of the entity from whom the creditor purchased the account; (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account; (iii) the date of an account holder's last transaction; (iv) the date of the last payment on the account; and (v) the date on which the account was charged to profit and loss.
>
> (B) On written request . . . the holder of a claim based on an open-end or revolving consumer credit agreement shall . . . provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

FED. R. BANKR. P. 3001(c)(3).

186. According to the Bureau, these companies were the two largest bulk debt purchasers as of 2015. *See CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CONSUMER FIN. PROTECTION BUREAU (Sept. 9, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/ [https://perma.cc/97VC-NDWB].

187. *See* Portfolio Recovery Assocs., LLC, CFPB No. 2015-CFPB-0023; Encore Capital Grp., Inc., CFPB No. 2015-CFPB-0022.

188. *See Portfolio Recovery Assocs.*, No. 2015-CFPB-0023, at 38–39; *Encore Capital Grp.*, No. 2015-CFPB-0022, at 38–39.

189. *See, e.g.*, Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 369–70 (describing how debt buyers have inundated the bankruptcy system with proofs of claim for debt for which the applicable statute of limitations has run, which capitalizes on the likelihood that some of these claims will pass through the bankruptcy process without an objection).

3. The Bureau's Amicus Strategy

The Bureau regularly submits amicus briefs in cases that involve the interpretation of statutes under its authority.[190] These efforts aim to achieve a correct and consistent interpretation of these statutes by the Supreme Court and federal circuit courts.[191] In some cases, the Bureau files briefs independently, while in others, the Bureau submits a brief in conjunction with other federal agencies.[192]

At times, the Bureau's amicus strategy encompasses matters that have direct bearing on consumer bankruptcy cases.[193] For example, the Bureau recently joined the Office of the Solicitor General and the Executive Office for United States Trustees in an amicus brief filed in *Midland Funding, LLC v. Johnson*.[194] In that case, the Supreme Court considered whether the practice of filing proofs of claim for time-barred debt violated the FDCPA, and whether the FDCPA can be invoked in consumer bankruptcy cases.[195] The amici, writing together as the United States, argued that the practice of filing proofs of claim for time-barred debt was "unfair" and "misleading" under the terms of the FDCPA, and that the Bankruptcy Code did not preclude application of the FDCPA to the dispute.[196]

Midland Funding had the potential to affect the consumer bankruptcy process in several key ways. Most obviously, the availability of the FDCPA to address the practice of filing time-barred debt claims was

190. *See Amicus Program*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/policy-compliance/amicus/ [https://perma.cc/5AGJ-DJAR] (expressing the CFPB's policy on submitting amicus briefs and providing a list of recent cases in which the Bureau submitted amicus briefs).

191. *See id.*

192. *Compare, e.g.*, Brief for Consumer Financial Protection Bureau as Amici Curiae Supporting Appellants at 1, Regions Bank v. Legal Outsource PA, 936 F.3d 1184 (11th Cir. 2019) (No. 17-11736) (demonstrating a brief filed independently), *with* Brief for Consumer Financial Protection Bureau & Federal Trade Commission as Amici Curiae Supporting Appellant at 1, Rivera v. JPMorgan Chase Bank, NA, 2016 U.S. App. LEXIS 14356 (D.C. Cir. July 14, 2016) (No. 16-7008) (demonstrating a brief filed in conjunction with the Federal Trade Commission).

193. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 8, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2016) (No. 16-348) (addressing whether the FDCPA prohibits a debt collector from filing a proof of claim in bankruptcy for a debt that is time-barred).

194. 137 S. Ct. 1407 (2016); Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note193, at 1.

195. *See* Petition for a Writ of Certiorari at I, *Midland Funding*, 137 S. Ct. 1407 (No. 16-348) ("Questions Presented [on certiorari:] 1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act. 2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.").

196. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 193, at 8–9.

directly relevant to the debtors' remedial options when such claims were filed in their bankruptcy cases.[197] This issue also raised the broader question of which party in a bankruptcy case—the debtor, the trustee, or the creditor that filed the claim—should bear the burden of policing stale debt claims.[198] A host of creditor associations submitted amicus briefs that argued that imposing FDCPA liability would, in essence, place the burden of asserting statute-of-limitations defenses on the filing creditor, in contravention to the text of the Bankruptcy Code.[199] The Supreme Court agreed with these arguments, and now that the FDCPA has been removed as a remedy, the bankruptcy system has struggled to address the regulatory gap that remains.[200] The Supreme Court ultimately did not resolve the second question presented in *Midland Funding*: whether the Bankruptcy Code precludes application of the FDCPA to bankruptcy-related FDCPA violations. Yet if the Court later decides that the FDCPA does not apply in bankruptcy, it would gut the applicability of a host of federal statutes that are regularly asserted in consumer bankruptcy cases.

The majority of the Bureau's amicus briefs do not have such direct connections with bankruptcy. Nevertheless, because many federal consumer protection statutes can be invoked in bankruptcy cases, the Bureau's attempts to refine the interpretation of these statutes can have ripple effects in consumer bankruptcy. For example, the Bureau filed an amicus brief in *Spokeo, Inc. v. Robins*,[201] a recent Supreme Court case that considered the extent of injury necessary for Article III standing to assert a claim under the Fair Credit Reporting Act (FCRA).[202] More recently, the Bureau submitted an amicus brief in *Johnson v. Admiral Investments, LLC*,[203] a case that considered standing to bring an FDCPA claim after *Spokeo*.[204] *Johnson* also involved whether a "competent attorney" standard should apply to FDCPA claims involving communications sent to a consumer represented by counsel.[205] Although neither of these cases directly involved bankruptcy issues, both cases have broad relevance for consumers who bring claims under a wide range of federal consumer protection statutes. Creditors may frequently violate federal consumer protection statutes including FCRA, the FDCPA, and

---

197. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 369–71.

198. *See id.* at 366.

199. *See, e.g.*, Brief of ACA International as Amicus Curiae, *Midland Funding*, 137 S. Ct. 1407 (No. 16-348).

200. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 381.

201. 136 S. Ct. 1540 (2016).

202. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 6, *Spokeo, Inc.*, 136 S. Ct. 1540 (No. 13-1339).

203. Civil No. 16–452 (MJD/TNL), 2017 WL 451945 (D. Minn. Feb. 2, 2017).

204. *See* Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Appellant at 7*, Johnson*, 2017 WL 451945 (No. 17-1298).

205. *Id.* at 5.

REPSA, while interfacing with borrowers in bankruptcy. Accordingly, the Bureau's efforts to clarify core concepts relating to standing and whether these statutes have been violated will affect the extent to which these matters can be asserted in consumer bankruptcy cases.

Table 3: Scope of Bureau Authority

RULEMAKING
• Covered persons (those who provide consumer financial products or services) • Entities subject to particular enumerated consumer laws (Table 2)

SUPERVISION
• Banks with more than $10 billion in assets, including their affiliates • Nonbank covered persons • Larger market participants as defined by Bureau rules

ENFORCEMENT
• Banks with more than $10 billion in assets, including their affiliates (but authority is concurrent with appropriate prudential regulator) • Nonbank covered persons (but authority is concurrent with FTC and shared pursuant to a memorandum of understanding)

III. THE BUREAU AS AN ADJUNCT REGULATOR

The prior Part explores how the Bureau's regulatory activities have crossed over into consumer bankruptcy cases. This Part argues that the consumer bankruptcy process would benefit if the Bureau adopted a more purposeful regulatory strategy in consumer bankruptcy cases. We explain how structural realities and resource constraints undermine the consumer bankruptcy system's ability to regulate systematic misconduct internally, and show that the Bureau can fill those gaps where its statutory authorities interface with bankruptcy.

A. *Consumer Bankruptcy Has Space for an Adjunct Regulator*

1. Consumer Bankruptcy's Enforcement Gap

The consumer bankruptcy process is a procedurally rigorous undertaking. The Bankruptcy Code and Rules specify in painstaking detail how debtors must marshal their income and assets, and how their debts must be reconciled before debtors receive a fresh start. Both during the bankruptcy case and after discharge, the Bankruptcy Code limits the type of collection activity that creditors may pursue.[206] Creditors must file a proof of claim in order to obtain their pro-rata share of a debtor's assets and plan payments,[207] and must comply with detailed lift-stay procedures if they wish to enforce their rights against the debtor's property.[208]

But creditors can economize by ignoring the details required by the Code and procedural rules, or by failing to invest in technology that can accommodate the particular requirements of an ongoing bankruptcy case.[209] Some creditors have also affirmatively overdrawn from the bankruptcy process by seeking payment of debts in a manner that does not align with bankruptcy's distributional rules.[210]

This type of behavior has flourished in bankruptcy's proof-of-claim process. In 2008, Katherine Porter published the results of an empirical study of bankruptcy mortgage claims, revealing endemic non-compliance with the procedural rules governing claims.[211] A majority of the claims in Porter's sample failed to comply with the documentation and detail required by the Bankruptcy Code.[212] Moreover, most claims overstated the amount owed, in relation to the amount the debtor believed was owed.[213] This article led to new bankruptcy rules that require an additional level of detail in bankruptcy claims,[214] but case law following

206. *See* 11 U.S.C. § 362(a) (2012) (providing that the filing of a bankruptcy petition operates as a stay of a vast array of collection activities); *id.* § 524(a) (providing that the entry of an order of discharge enjoins creditors from collecting discharged debt).

207. *See generally id.* § 501 (providing that creditors and interest holders may file proofs of claim); FED. R. BANKR. P. 3001–05 (setting forth the procedure for claims filing).

208. *See* 11 U.S.C. § 362(d); FED. R. BANKR. P. 4001(a).

209. *See* Bruce, *Debtor Class*, *supra* note 6, at 26–30.

210. *See id.* at 28–30.

211. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123 (2008).

212. *Id.* at 162–63.

213. *Id.* Porter's study reflects that creditors and debtors agreed on the amount the debtor owed in only 4.4% of cases. *Id.* at 162. Of the 95.6% of cases where the debtor and creditor disagreed on the amount of the debt, 70.4% of the time the mortgage lender asserted that more was owed. *Id.* The median difference was $1366 and the average difference was $3533. *Id.* at 163.

214. *See* FED. R. BANKR. P. 3001, 3002.1. Bankruptcy Rule 3001 requires creditors to itemize the interest, fees, expenses, and other charges claimed. *Id.* at 3001(c)(2). Secured creditors must also state the amount necessary to cure a default and, if the lien is on the debtor's principal residence, provide an escrow statement as of the petition date. *Id.* If a creditor fails to supply the information required by Rule 3001, the court may prohibit the lender from relying on such information in future proceedings. *Id.* at 3001(c)(2)(D). The court may "award other appropriate relief, including . . . attorney's fees." *See id.* at 3002.1, which requires holders of mortgage claims to provide notice before a change in the amount of mortgage payments, as well as notices of the fees, expenses or charges incurred postpetition that the claimant asserts are recoverable from the debtor.

those amendments suggest that some creditors have made the calculated decision not to follow these rules.[215]

As described above, debt buyers have also flooded the bankruptcy system with proofs of claim for debt on which the statute of limitations have run.[216] The statute of limitations is an affirmative defense that is typically raised in a claim objection.[217] The creditors' practice relies on the likelihood that neither the debtor nor the chapter 7 or 13 trustee will object to all filed claims, either because of the sheer number of claims filed or because the cost of objecting outweighs the benefit to the estate.[218] As such, these creditors successfully overdraw small amounts in individual bankruptcy cases, which in the aggregate may amount to significant gains.[219]

Post-discharge debt collection is another fertile area for creditor overreaching. Creditors have long undermined bankruptcy's fresh start through a variety of actions that violate bankruptcy's discharge injunction.[220] For example, before the discharge injunction was codified, creditors took advantage of the fact that the discharge was an affirmative defense that had to be raised by the debtor in litigation.[221] These creditors relied on the likelihood that debtors would not understand this procedural reality in order to obtain default judgments for debt that had been discharged in bankruptcy.[222] Then, in the 1990s, a large number of

---

215. *See, e.g.*, *In re* Gravel, 556 B.R. 561, 580 (Bankr. D. Vt. 2016) (sanctioning creditor $300,000 for its repeated failure to comply with Bankruptcy Rule 3002.1), *vacated*, PHH Mortg. Corp. v. Sensenich, No. 5:16-cv-00257-gwc, 2017 WL 6999820 (D. Vt. Dec. 18, 2017).

216. *See generally* Bruce, *Debt Buyers Beware*, *supra* note 6, at 1 (describing this rash of cases); Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 369–70 (providing further detail of such occurrence); *see also* Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1409–10 (2017) (holding that this practice does not violate the FDCPA).

217. *See Midland Funding*, 137 S. Ct. at 1412, 1414–15 (emphasizing this procedural point).

218. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 369–71 (describing this issue).

219. *Id.*

220. Section 524(a) of the Code provides that the discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2) (2012).

221. Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 AM. BANKR. L.J. 461, 523 (2002) ("[C]reditors could wantonly ignore the debtor's discharge and sue in state court, in the hopes that the debtor would simply default, and many debtors did default on the mistaken assumption that the bankruptcy discharge made it unnecessary to appear and defend suits on discharged debts."). The discharge injunction was first codified as part of the "discharge amendments" to the 1898 Bankruptcy Act, which were enacted in 1970. *See* Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 990. This treatment carried over into section 524 of the Bankruptcy Code, which was enacted in 1978. The Bankruptcy Reform Act of 1978, Pub. L No. 95–598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532).

222. *See* Brubaker, *supra* note 221, at 523.

creditors embraced the practice of pursuing debt after discharge based on reaffirmation agreements that were not filed with the court and were therefore unenforceable.[223] More recently, creditors have allegedly refused to remove discharged debt from borrowers' credit reports, in an apparent effort to cajole future payment.[224] And, student loan creditors have allegedly generated large numbers of dischargeable student loans, which they aggressively collect after bankruptcy despite the fact that these loans were discharged.[225] Debtors are particularly vulnerable to these types of improper post-discharge debt-collection activities, because they typically lack regular access to bankruptcy counsel after their case has concluded.[226]

Creditors frequently run afoul of chapter 13 of the Bankruptcy Code when their payment processing software is not robust enough to accommodate the requirements of a chapter 13 bankruptcy case.[227] The Bureau's recent action against Ocwen Loan Servicing, a large nonbank mortgage servicer, illustrates this problem.[228] According to the Bureau's complaint, Ocwen uses one platform to calculate proof of claim amounts and another to track prepetition arrearages, but those two systems do not interact properly.[229] Further, the Bureau alleges that Ocwen improperly applied funds from chapter 13 trustees to miscellaneous suspense or other nonpayment accounts, rather than to pay down the debt as required by the terms of debtors' plan.[230] Ocwen also allegedly failed to conduct annual

---

223. *See* Bruce, *Debtor Class*, *supra* note 6, at 28–30 (describing the reaffirmation scandal).

224. *See, e.g.*, Credit One Fin. v. Anderson (*In re* Anderson), 553 B.R. 221, 225 (S.D.N.Y. 2016) (raising this issue); Silver-Greenberg, *Debts Canceled by Bankruptcy*, *supra* note 150.

225. *See generally* Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. (forthcoming 2019) (draft on file with author) (discussing this issue in detail); Kara Bruce, *Educational Discharge*, *supra* note 6, at 3–7 (profiling recent cases).

226. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 504.

227. *See, e.g.*, Ronemus v. FTB Mortg. Servs. (*In re* Ronemus), 201 B.R. 458, 459–61 (Bankr. N.D. Tex. 1996) (awarding damages to the debtor for, among other things, the creditor's failure to maintain adequate records, and misapplication of the debtor's payments); *In re* Rathe, 114 B.R. 253, 257 (Bankr. D. Idaho 1990) ("Payments made during the pendency of the Chapter 13 plan should have been applied by [the lender] to the current payments due and owing with the arrearage amounts to be applied to the back payments. [The lender] cannot utilize its accounting procedures to contravene the terms of a confirmed Chapter 13 plan and the Bankruptcy Code.").

228. Complaint at 8, *supra* note 177, at 11–12.

229. *Id.* at 26. Paragraph 90 alleges that "[t]here is no connection between the proof of claim as determined in Equator/REALResolution [the system Ocwen uses to process bankruptcy] and the pre-petition arrearage balances in REALServicing. The proof of claim figures need to become the REALServicing arrearage balances." *Id.* (alteration in original).

230. *Id.* at 26–27. Paragraph 90 alleges that

> [t]he process of converting a bankruptcy trustee payment to a payment batch is highly manual and, therefore, both inefficient and at risk of error. Ocwen receives funds from bankruptcy trustees that, generally, need to be applied to borrower

or timely escrow analyses for loans in bankruptcy in violation of RESPA, the FDCPA, and the CFPA, and then tried to collect any resulting shortages in chapter 13 cases in violation of bankruptcy orders and rules.[231] Chapter 13 debtors are particularly sensitive to this kind of harm. An escrow shortage increases their monthly payment, and where the plan commits disposable income to unsecured creditors, the debtor may lack money to make the higher monthly payment.[232]

2. Bankruptcy's Vulnerability to Systemic Misconduct

The structure of the bankruptcy system makes it vulnerable to this type of activity. Bankruptcy functions on economies of scale. In order to maintain a low cost of access to bankruptcy, most professionals involved in bankruptcy cases handle very heavy caseloads as a matter of routine.[233]

> accounts as either pre-petition payments, post-petition payments, or bankruptcy interests. There are some cases where, due to loan status, funds from the trustee are not applied as payment, but are applied to miscellaneous suspense or other non-payment accounts. Ocwen receives funds from bankruptcy trustees in a single check that usually covers multiple accounts. Ocwen needs to apply the funds across the different loans.

Id.

231. *Id.* at 32–33. Paragraphs 109 and 110 allege:

> 109. In some instances, Ocwen failed to perform or timely perform escrow analyses during the pendency of a Chapter 13 bankruptcy. Further, Ocwen failed to service its loans in accordance with bankruptcy protections and has attempted to collect purported escrow shortages or arrears in violation of bankruptcy orders and rules.
>
> 110. In June 2016, Ocwen's Head of Bankruptcy testified that more than 22,000 borrowers in bankruptcy were impacted by Ocwen's failure to conduct a timely escrow analysis and that Ocwen is currently attempting to remediate these borrowers. Ocwen's consumer complaint data indicates that, for the year of April 2015 to April 2016, at least 8,000 of these 22,000 impacted borrowers complained to Ocwen.

Id.

232. *Id.* at 36, ¶ 122. The Bureau's complaint also asserts that Ocwen has transferred loans to new servicers without providing understandable information about loans that are subject to a bankruptcy discharge, information necessary to comply with consumer bankruptcy laws. *Id.* at 64 ¶ 206.

233. *See, e.g.*, HENRY J. SOMMER ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE 81 (John Rao ed., 11th ed. 2016) ("Once it has been decided that bankruptcy is appropriate in a particular case, most of the remaining work is relatively routine. A good deal of it involves preparation of the necessary papers for the initial filing."); Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1122 (2016) ("Although bankruptcy is formally a judicial process, much of that process historically has been and continues to be managerial and ministerial in nature."); William C. Whitford, *The Ideal of Individualized Justice: Consumer*

Further, deep asymmetries in information, sophistication, and resources between debtors and creditors make it easy for creditors to extract undue benefits from the bankruptcy process.[234] On one hand, debtors typically lack deep institutional knowledge of the bankruptcy system.[235] Even though many debtors access bankruptcy with the assistance of knowledgeable counsel, their attorneys frequently charge a low, flat fee for bankruptcy representation that carves out collateral litigation.[236] As such, under-resourced debtors may have to pay out-of-pocket to challenge wrongful behavior.[237] Moreover, improper post-discharge collection activity occurs when debtors no longer have regular exposure to their attorneys or the protection of a pending bankruptcy case.

On the other hand, large institutional creditors regularly interface with the bankruptcy system.[238] Not only do they generally have a better understanding of the details of the bankruptcy process, they also have an incentive to perpetuate the conditions that allow them to profit across many cases.[239] Accordingly, creditors may be willing to spend significant amounts to litigate or settle an individual debtor's legal challenge, when the outcome of that individual case has spillover effects for similar bankruptcy cases.[240] Meanwhile, an individual debtor cannot or will not match those expenses and may well be incentivized to accept a settlement the creditor offers.[241]

3. Bankruptcy's Enforcers and Their Limitations

By all accounts, bankruptcy features a fairly robust system of enforcers to address these problems. First, every consumer's bankruptcy case is assigned to a bankruptcy judge with broad authority to enforce

---

Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy, 68 AM. BANKR. L.J. 397, 406 (1994) ("Routine, uncontested cases allow [consumer bankruptcy attorneys] to charge low fees, which in turn makes it easier to attract a sufficiently large clientele to justify investment in routinized procedures."). *But see* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 121–22 (2012) (noting that, especially after enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), "there are ever fewer seemingly simple cases").

234. *See generally, e.g.*, Iuliano, *supra* note 225 (discussing this dynamic in the context of student loan collection).

235. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 503–04.

236. *See id.* at 504; Lupica, *supra* note 233, at 110.

237. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 502–04.

238. *See* Bruce, *Debtor Class*, *supra* note 6, at 37.

239. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 503.

240. *See id.* ("Even if a consumer can surmount those hurdles, the amount she is able to invest in a suit might well be dwarfed by the investment of a company that profits from perpetuating the harm on similarly situated consumers.").

241. *See generally, e.g.*, Iuliano, *supra* note 225 (discussing how this phenomenon plays out in student loan non-dischargeability litigation).

bankruptcy law.[242] Second, a trustee is appointed in every case to oversee the liquidation process in a chapter 7 case, or to administer plan payments in a chapter 13 bankruptcy case.[243] Trustees are charged with the statutory duty to maximize the estate for the benefit of all creditors, and that duty would seem to include addressing systematic overdrawing by certain creditors.[244] Third, other creditors and debtors themselves may have the power to challenge misconduct by other participants in a bankruptcy case.[245] And finally, the United States Trustee Program (USTP), a division of the Department of Justice, serves as a "watchdog" against systematic bankruptcy misconduct and can appear and be heard on any matter.[246] The following paragraphs detail how structural weaknesses prevent these stakeholders from addressing widespread and small-scale wrongdoing.

a. Bankruptcy's Front-Line Participants

Although debtors, competing creditors, and the chapter 7 or 13 trustee are involved in the trenches of a bankruptcy case and therefore are well positioned to object to improper activity, practical realities and resource constraints undermine their ability to do so comprehensively. First, the

242. In addition to any authority within an individual Code section, section 105(a) of the Code gives bankruptcy judge broad authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a) (2012).

243. *See* 2 GINSBERG & MARTIN ON BANKRUPTCY § 15.03 [B], [C] (5th ed. Supp. III 2019). In chapter 7 cases, the trustee typically oversees the liquidation of any non-exempt assets and distribution of proceeds to creditors. *See id.* In chapter 13 cases, trustees collect debtors' payments under a plan and distribute them to creditors. *See id.*

244. *See* 11 U.S.C. § 323(a) (providing that the trustee is the representative for the estate); Bruce & Sickler, *Private Remedies Post-*Midland, *supra* note 6, at 376 (discussing trustees' duties).

245. *See* Bruce & Sickler, *Private Remedies Post-*Midland, *supra* note 6, at 375 ("Trustees have sound arguments that other bankruptcy participants, including debtors . . . and the creditor filing the proof of claim, have superior information to assess a claim's staleness.").

246. The U.S. Trustee Program is primarily a litigating division of the Department of Justice (DOJ). *Trustees and Administrators*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/trustees-and-administrators [https://perma.cc/SFL2-CHAL]. Its mission is to promote the integrity and efficiency of the nation's bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public. Mark I. Bane et al., COLLIER ON BANKRUPTCY ¶ 6.01[2] (Matthew Bender ed., 16th ed. 2017) (describing the role of the UST). In addition to its administrative oversight of the bankruptcy process, the U.S. Trustee has both civil and criminal enforcement powers. *See* 28 U.S.C. § 586(a)(3) (2012) (delineating the administrative duties of the UST); H.R. REP. NO. 95-595, at 109 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6070 ("[The U.S. Trustees] will serve as enforcers of the bankruptcy laws by bringing proceedings in the bankruptcy courts in particular cases in which a particular action taken or proposed to be taken deviates from the standards established by the proposed bankruptcy code."). In North Carolina and Alabama, Bankruptcy Administrators, a division of the courts, fill a similar function. *Trustees and Administrators*, *supra*.

recoveries on such actions are often too small to justify the cost of challenging the wrongful behavior.[247] For example, proofs of claim that fail to include adequate documentation or seek to collect improper amounts may have negligible impact on a debtor's distributions or case outcome, but in the aggregate can result in cost savings or direct profits to creditors that employ these strategies.[248] Competing creditors likewise lack a financial interest in objecting, as they often receive pennies or less in distribution from an individual debtor's bankruptcy case.[249] Chapter 7 panel trustees receive payment of $60 in each bankruptcy case, "plus a sliding-scale commission of the amounts they disburse from the bankruptcy estate."[250] Most chapter 13 trustees receive a percentage of the monthly disbursements made under a chapter 13 plan.[251] Debtors' attorneys, as noted above, generally receive a low, flat fee for bankruptcy representation.[252] These low fees make it difficult for bankruptcy professionals to dedicate the time and attention it takes to address small-scale behavior in an individual case.[253]

In other writings, we have explored how these types of asymmetries present a classic case for class action relief.[254] Yet judicial limitations on class actions in general, and complicated jurisdictional and remedial issues facing debtor class actions in particular, may constrain their utility in many debtors' bankruptcy cases.[255] More broadly, limitations inherent in judicial doctrines can frustrate individual litigants' efforts to police bankruptcy misconduct.[256]

b. Bankruptcy Judges

Bankruptcy judges have some ability to police creditor misconduct through their statutory and inherent powers to sanction.[257] But,

247. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 376.

248. For a more robust discussion of this issue, see *id.*

249. *See id.*

250. Bruce, *Debtor Class*, *supra* note 6, at 38.

251. Bruce, *Enforcement Gap*, *supra* note 6, at 492.

252. Lupica, *supra* note 233, at 99.

253. *See* Matthew A. Bruckner, *Crowdsourcing (Bankruptcy) Fee Control*, 46 SETON HALL L. REV. 361, 362 (2016) (arguing that bankruptcy professionals may lack the incentive to police overdrawing).

254. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 494–95; Bruce, *Debtor Class*, *supra* note 6, at 21; Bruce, *Vindicating*, *supra* note 6, at 445–46.

255. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 512–14; Bruce, *Debtor Class*, *supra* note 6, at 43–44; Bruce, *Vindicating*, *supra* note 6, at 451–85.

256. *See* Taggart v. Lorenzen, 139 S. Ct. 1795, 1804 (2019) (holding that a court may award civil contempt sanctions for discharge violations where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order," a standard that makes it difficult for debtors and their attorneys to challenge novel types of potential discharge violations).

257. *See supra* note 242 and accompanying text.

bankruptcy courts lack investigatory powers, and therefore "do[] not have the machinery to go beyond what is affirmatively presented, other than what the court can learn from questioning the presenter directly."[258] Bankruptcy judges are further limited by the Bankruptcy Code's remedial scheme—which generally does not contemplate systemic misbehavior—as well as the limitations of judges' status under Article I of the Constitution.[259]

Casamatta v. Resurgent Capital Services, L.P. (*In re Freeman-Clay*)[260] provides a prime example of these limitations. There, the U.S. Trustee brought suit against a claim servicer, alleging that the servicer abused the bankruptcy process by (among other things) robosigning proofs of claim, knowingly filing claims for time-barred debt, and failing to attach the documentation required by Rule 3001(c).[261] Although the court found the defendants' behavior to be "disturbing"[262] and a violation of several Bankruptcy Rules, the court nevertheless held that most of the relief requested by the U.S. Trustee was beyond the court's authority to award.[263] The court underscored that the Bankruptcy Code provided a remedy for each of the actions the U.S. Trustee alleged: failure to comply with the rules governing proofs of claim strips a claim of its prima facie validity;[264] expiration of the statute of limitations is an affirmative defense to the allowability of a claim;[265] and failure to comply with the requirements in Rule 3001(c) provides additional enumerated remedies,

258. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 982 (1993).

259. Bankruptcy Judges are Article I judges, and as such they lack the Article III protections of life tenure and salary protection. *See* U.S. CONST. art. I, § 8, cl. 4. On this basis, they are generally understood to have fewer fundamentally "judicial" powers than their Article III counterparts. *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1946 (2015); Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 28 (2014); Stern v. Marshall, 564 U.S. 462, 469 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

260. 578 B.R. 423 (Bankr. W.D. Mo. 2017).

261. *Id.* at 427.

262. *Id.*

263. *Id.* at 455–57. In particular, the court held that the complaint's allegation for robosigning did not support a sanction award because the trustee did not allege that Resurgent acted in bad faith, and there was no damage alleged to the debtors. *Id.* at 455–56. The court held that Rule 9011 was not invoked for filing time-barred debt claims because that behavior did not clearly violate the law. *Id.* at 456. And even though Resurgent did not dispute its failure to comply with Rule 3001, the appropriate remedy for such violations is that the creditor's proof of claim loses its prima facie validity. *Id.* at 456–57. Although Rule 3001 permits courts to award "other appropriate relief" in certain circumstances, "[c]ourts have rejected attempts to use the Rule to impose miscellaneous creative remedies such as some of those urged by the UST." *Id.* at 457.

264. *Id.* at 435 (collecting authority).

265. *Id.* at 438; *see* Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1412 (2017).

including the award of reasonable expenses and attorney's fees.[266] Although the U.S. Trustee alleged that those remedies were insufficient to address the conduct in the case before the court, the court rejected the idea that it could impose additional penalties because of the creditor's systemic violations.[267] It stated:

> A review of the allegations of the Complaint makes clear that the UST is not focused solely or even primarily on the claims asserted by Defendants and filed by Resurgent in the two bankruptcy cases before this Court. The Complaint is replete with allegations of deficiencies in Resurgent's process with regard to the thousands of proofs of claims that it has filed in jurisdictions all over the country. . . .
>
> . . . .
>
> The Court concludes it has no power to grant relief which would purport to be binding as to claims filed and conduct occurring in cases other than the ones before this Court. But if this Court had the power to do so, the Court would decline to exercise it . . . . There are numerous legal and practical reasons supporting this view.[268]

To be sure, bankruptcy courts possess some degree of authority to sanction improper behavior or prevent an abuse of process.[269] But courts

266. *In re Freeman-Clay*, 578 B.R. at 445. Rule 3001(c)(2)(D) provides that if the holder of a claim fails to provide any information required by this subdivision (c), "the court may . . . (i) preclude the holder from presenting the omitted information . . . or (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." FED. R. BANKR. P. 3001(c)(2)(D).

267. *In re Freeman-Clay*, 578 B.R. at 452–53.

268. *Id.*

269. Most courts have concluded that bankruptcy judges can exercise civil contempt authority, either because they have inherent authority or because such power is vested in bankruptcy courts by section 105 of the Bankruptcy Code. *See, e.g.*, Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("[T]he statutes specifying that a discharge order 'operates as an injunction,' and that a court may issue any 'order' or 'judgment' that is 'necessary or appropriate' to 'carry out' other bankruptcy provisions bring with them the 'old soil' that has long governed how courts enforce injunctions." (citations omitted)); Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613 (5th Cir. 1997) ("[A] bankruptcy court's power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105."); Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1553 (11th Cir. 1996) ("[C]ourts have inherent contempt powers in all proceedings, including bankruptcy, to 'achieve the orderly and expeditious disposition of cases.' Under § 105, Congress expressly grants court's independent statutory powers in bankruptcy proceedings to 'carry out the provisions of' the Bankruptcy Code through 'any order, process, or judgment that is necessary or appropriate.'" (citations omitted) (first quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); then quoting 11 U.S.C. § 105(a) (2012)));

are sharply divided over whether bankruptcy judges have criminal contempt authority.[270] "The principal constitutional concern . . . arises from the fact that bankruptcy judges do not have the life tenure during good behavior and protection against diminished compensation which Article III, section 1, requires for federal judges exercising '[t]he judicial Power of the United States.'"[271] As such, most courts hold that bankruptcy courts are limited to awarding compensatory or coercive relief, or perhaps *de minimis* penalties.[272] Remedies that purport to address harms beyond the case before the court have been characterized as matters of criminal contempt, beyond the court's authority to sanction.[273] For this reason, many bankruptcy judges' creative attempts to address widespread bankruptcy misconduct have been reversed on appeal.[274]

c. The United States Trustee Program

The USTP is bankruptcy's primary structural safeguard, charged with promoting the efficiency and integrity of the bankruptcy system.[275] To carry out its mission, the USTP performs many administrative, regulatory, and enforcement functions, including monitoring creditor

---

Rainbow Magazine, Inc. v. Unified Capital Corp. (*In re* Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996) ("There can be little doubt that bankruptcy courts have the inherent power to sanction vexatious conduct presented before the court. The inherent power is recognized in the statutory grant Congress has provided the bankruptcy courts . . . ."); Power Recovery Sys., Inc. v. Dodge Chem. Co. (*In re* Power Recovery Sys., Inc.), 950 F.2d 798, 802 (1st Cir. 1991) ("It is well-settled law that bankruptcy courts are vested with [civil] contempt power."); Burd v. Walters (*In re* Walters), 868 F.2d 665, 669 (4th Cir. 1989) (upholding bankruptcy court's contempt award based on Code section 105).

270. *See* Dyer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1193 n.15 (9th Cir. 2003) (collecting cases).

271. Hipp, Inc. v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1510 (5th Cir. 1990).

272. *See* John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts*, 91 AM. BANKR. L.J. 311, 313–15 (2017) (cataloguing various courts' approaches to this issue).

273. *See generally* Bruce, *Channeling Under 362(k)*, *supra* note 6 (collecting examples).

274. *See, e.g.*, Wells Fargo Bank, N.A. v. Stewart (*In re* Stewart), 647 F.3d 553, 556 (5th Cir. 2011) (holding that the bankruptcy court exceeded its authority by requiring Wells Fargo to audit every proof of claim filed in that jurisdiction, based on a pattern of misconduct relating to claims); PHH Mortg. Corp. v. Sensenich, No. 5:16-cv-00257-gwc, 2017 WL 6999820, at *9 (D. Vt. Dec. 18, 2017) (reversing award of punitive damages for rampant violations of Rule 3002.1 and bankruptcy court orders); Countrywide Homes Loans, Inc. v. McDermott, 426 B.R. 267, 281 (N.D. Ohio 2010) (stating that the lower court order requiring Countrywide to accompany each proof of claim with a supplemental worksheet was not supported by the factual record in the individual case before the court).

275. *See Strategic Plan & Mission*, U.S. DEP'T JUST., https://www.justice.gov/ust/strategic-plan-mission [https://perma.cc/6T4Y-Z4HH] (last updated May 8, 2015) ("The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.").

misconduct in the bankruptcy system.[276] For over ten years, the USTP has made curbing creditor misconduct in consumer bankruptcy cases a key enforcement priority.[277] The USTP exercises prosecutorial discretion, focusing its enforcement efforts on cases "in which the integrity of the bankruptcy system as a whole is at stake" and which involve "substantial sums of money [or] particularly egregious behavior."[278] Its achievements include numerous nationwide settlements with a variety of large, institutional creditors to remedy systemic violations of the Bankruptcy Code.[279] In particular, the USTP has been successful in holding mortgage servicers and unsecured creditors accountable for violations of the Bankruptcy Code and Rules.[280]

---

276. *See* EXEC. OFFICE FOR U.S. TRS., U.S. DEP'T OF JUSTICE, UNITED STATES TRUSTEE PROGRAM ANNUAL REPORT OF SIGNIFICANT ACCOMPLISHMENTS FOR FISCAL YEAR 2016, at 2 (2016), https://www.justice.gov/ust/file/ar_2016.pdf/download [https://perma.cc/LA2M-3XMA]. The Program has broad administrative authority over all bankruptcy cases. *See id.* (describing the Program's core authority). Its core responsibilities include participating directly in chapter 11 cases; overseeing the work of thousands of private trustees appointed in chapter 7, 12, and 13 bankruptcy cases; supervising credit counseling and financial education agencies that operate in tandem with the bankruptcy process; pursuing criminal enforcement; and participating in appeals on key bankruptcy issues. *See id.*

277. *See* Clifford J. White III, Dir., U.S. Tr. Program, Director Cliff White Addresses the 2017 Fall Conference of the National Creditors Bar Association (Oct. 12, 2017) [hereinafter White, NCBA Address], https://www.justice.gov/ust/speeches-testimony/narca_10122017 [https://perma.cc/P3CL-W3GV]; *see also Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 55 (2015) (statement of Clifford J. White III, Director, Executive Office for U.S. Trustees, U.S. Department of Justice) ("In fiscal year 2014, United States Trustees initiated more than 6,800 civil enforcement actions and inquiries against creditors, lawyers, bankruptcy petition preparers, and other parties who acted improperly towards debtors. Nearly 2,100 of these related to abusive conduct by creditors, including about 72 percent of which involved mortgage fraud and abuse.").

278. Tamara Ogier & Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317, 347–48 (1998).

279. *See A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax, and Environmental and Natural Resources Divisions and the U.S. Trustee Program: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 3, 10–11 (2017) (statement of Clifford J. White III, Director, Executive Office for U.S. Trustees, U.S. Department of Justice) ("[T]he USTP has entered into six national settlements that provided monetary remediation and other relief for homeowners in bankruptcy and, in some cases, required mortgage servicing standards to prevent future abuse of the bankruptcy rules.").

280. *See, e.g.*, Order Approving Settlement Between the United States Trustee Program, Citibank, N.A. and Department Stores National Bank at 4, *In re* Fazzon, No. 18-00201-jrs (Bankr. N.D. Ga. Sept. 24, 2018) (requiring Citibank to pay $5 million to remediate robo-signed proofs of claim in consumer bankruptcy cases); Order Approving Settlement Between the United States Trustee Program and JPMorgan Chase Bank, N.A. at 2, *In re* Belzak, No. 10-23963-dob (Bankr. E.D. Mich. Mar. 3, 2015); *see also* White, NCBA Address, *supra* note 277.

But despite these achievements, the USTP faces structural barriers to addressing widespread but small-scale consumer protection issues. Most importantly, the USTP lacks the broad, market-wide information gathering resources that the Bureau has and already deploys on a regular basis.[281] While the USTP has the ability to examine entities pursuant to Rule 2004 of the Bankruptcy Code[282] and to engage in ordinary discovery in adversary proceedings and contested matters,[283] these powers are sharply confined to an individual debtor or case.

Further, the USTP's civil enforcement authority is constrained by the Code's remedial limitations.[284] Just as bankruptcy courts and private litigants have faced barriers in addressing creditor misconduct that has occurred on a widespread basis, the USTP is likewise limited to the remedies provided by the Bankruptcy Code and whatever authority Article I bankruptcy judges possess to fill in the gaps.[285] The USTP's unsuccessful attempts to address the problem of stale debt claims within the confines of individual bankruptcy cases, as in *Freeman-Clay*, discussed above, underscores some of these points.[286] To be sure, the USTP may make criminal referrals in the appropriate cases, but this power leaves a large amount of non-criminal but nevertheless improper conduct without a meaningful aggregate solution.[287]

d. Law Reform and Procedural Rule Reform

Congress could amend the Bankruptcy Code to address the bankruptcy-related non-compliance described in this Section. More immediately, some of the problems discussed in this Section might be tempered by amendments to the Federal Rules of Bankruptcy Procedure, or by court-crafted local rules or standing orders.[288] Yet the law or rule-

281. *See infra* Section IV.A.

282. FED. R. BANKR. P. 2004(a) ("On motion of any party in interest, the court may order the examination of any entity.").

283. *See id.* at 7026 (incorporating Federal Rule of Civil Procedure 26 with respect to adversary proceedings); *id.* at 9014 (providing that Federal Rule of Bankruptcy Procedure 7026 also applies to contested matters).

284. *See, e.g.*, Wells Fargo Bank, N.A. v. Stewart (*In re* Stewart), 647 F.3d 553, 556 (5th Cir. 2011); Casamatta v. Resurgent Capital Servs., L.P. (*In re* Freeman-Clay), 578 B.R. 423, 427–28 (Bankr. W.D. Mo. 2017).

285. *See supra* Section III.A.5.

286. *See supra* Section III.A.3; *supra* note 246 and accompanying text.

287. *See* 28 U.S.C. § 586(a)(3)(F) (2012) (providing that the U.S. Trustee's duties includes "notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action").

288. *See generally, e.g.*, Bruce & Sickler, *Private Remedies Post-*Midland, *supra* note 6 (examining the possibility of law and rule reform to address the problem of time-barred-debt claims).

reform process is slow and reactionary, and typically targets issues only after they have arisen in thousands of cases. Further, amendments that impose greater regulatory checks on creditors are likely to be hotly contested by the industry participants who profit from this type of behavior. In contrast, capitalizing on the Bureau's existing authority to address bankruptcy-specific regulatory gaps requires nothing beyond greater attention and communication between the Bureau and bankruptcy's stakeholders.

B. *The Bureau's Regulatory Authority Complements Bankruptcy's Enforcement Regime*

The prior Section explained that bankruptcy's existing regulators are not well suited to address pervasive but small-scale misbehavior in bankruptcy cases. This Section explains how the Bureau's triad of authority—rulemaking, supervision, and enforcement—complements consumer bankruptcy's regulatory structure. The following Part develops this broad overview by providing a detailed regulatory blueprint for enhanced Bureau regulation in consumer bankruptcy.

1. The Bureau's Regulatory Promise

The Bureau can provide the most direct and unique benefits to the consumer bankruptcy system through a more purposeful application of its data-gathering powers. As noted in Part II, the Bureau has broad authority to gather intelligence from regulated entities, and already may be gathering bankruptcy-specific information in the ordinary course of its operations.[289] The Bureau also operates a consumer complaint database and has the power to engage in market research and monitoring to identify market-wide trends.[290] Bankruptcy's existing enforcers lack such information-gathering powers, and structural realities in bankruptcy make systematic misconduct difficult to detect.[291] If the Bureau employed its information-gathering tools to unearth bankruptcy-specific misconduct, and shared its findings with bankruptcy's existing enforcers, this partnership could enhance the utility of bankruptcy's case-by-case remedial system.

The Bureau also has the power to issue administrative rules, which apply globally to the institutions and products it regulates.[292] This

289. *See supra* Section II.B.1.

290. *See infra* Part IV.

291. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 502–03; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1181–82 (2012) (arguing that public regulators, including the Bureau, have "significant informational advantages" because of the complexity of financial protection abuse and the fact that it is often difficult to detect except by reference to a large number of cases).

292. *See supra* Section II.A.

rulemaking authority stands in sharp contrast to the fragmented, case-by-case policymaking that typifies the consumer bankruptcy process.[293] Consumer bankruptcy lacks an administrative agency charged with rulemaking authority.[294] Rather, courts make bankruptcy policy on a case-by-case basis.[295] But policymaking through case-by-case adjudication cannot achieve comprehensive, system-wide regulation.[296] Courts are restricted to resolving the disputes presented to them. These disputes are not determined by the most pressing legal issues, but rather by the resources and interests of individual plaintiffs or complainants.[297] Further, even if creditor misconduct is challenged in court, adjudications of individual disputes lack precedential value and are often subject to review by courts that are not experts in the bankruptcy field.[298] All of this can contribute to the ragged development of policy across jurisdictions.[299]

Although the Bureau does not have authority to promulgate rules to implement the Bankruptcy Code, its regulations on loan servicing, credit reporting, and debt collection often cross over into the bankruptcy system. As such, the Bureau may be able to target improper behavior occurring in bankruptcy through these general consumer protection regulations.

Finally, the Bureau's authority to enforce federal consumer protection law is more flexible than the court-centric nature of bankruptcy enforcement. While bankruptcy courts are limited to policing conduct according to the Bankruptcy Code's remedial scheme, the Bureau has tools to work creatively and collaboratively with industry groups to find realistic solutions to increase compliance with bankruptcy laws.[300] The

293. *See* Rafael Pardo & Kathryn Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 390–91 (2012) (arguing for shifting bankruptcy policymaking from court-administered model to an administrative agency model). Two federal agencies exist with narrowly defined powers to set bankruptcy policy in limited contexts. *See id.* at 390. The first is the U.S. Trustee Program, which is a component of the U.S. Department of Justice and is responsible for all but two jurisdictions, North Carolina and Alabama, where the second, the Bankruptcy Administrators Program, operates under the Judicial Conference of the United States. *Id.* at 394–95. They can participate in bankruptcy cases as litigants who enforce bankruptcy laws. *Id.* at 398. They also have authority to supervise private trustees, credit counseling and educational agencies, and other professionals working in the bankruptcy space. *Id.* at 398–99. But neither has expansive rulemaking power to set substantive policy. *Id.* at 399.

294. *Id.* at 399.

295. *Id.* at 440.

296. *Id.*

297. *See supra* Section III.A.2.

298. Pardo & Watts, *supra* note 293, at 425.

299. *See id.* at 386–91.

300. *See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 375–76 (2019) (contrasting rulemaking and enforcement with examination because monitors work with industry and not against it).

Bureau could strategically deploy its enforcement authority to target conduct that eludes bankruptcy's remedial system.

Case law has shown that creditor action or inaction related to bankruptcy can violate various consumer protection laws under the Bureau's enforcement authority, including TILA, RESPA, the FDCPA, and the UDAAP ban.[301] The Bureau's authority to enforce these laws might provide additional remedial solutions for the type of conduct that the bankruptcy system has difficulty addressing. In these ways, the Bureau's enforcement powers can act as an additional check on industry groups and serve as a deterrent for other market actors.

2. Complementary Regulatory Regimes

Embracing the Bureau's role as an adjunct regulator neither exceeds the Bureau's statutory authority nor undermines the integrity of federal bankruptcy laws. Although the Bureau does not have express authority to promulgate regulations under the authority of the Bankruptcy Code, its authority was designed to be sweeping, so that consumer financial protection laws would be "comprehensive, fair, and vigorously enforced."[302] As drafted, the Bureau's authority covers the major players within the financial services markets, and governs virtually every dimension of the financial products and services those players generate.[303] Considering that bankruptcy looms as a possible end game in many of the financial transactions under Bureau authority, it fits easily within the umbrella of the Bureau's operations.

More to the point, the Bureau has shown a particular interest in addressing problems relating to the servicing and collection of debt.[304] "[A]t its core, [bankruptcy] is debt-collection law."[305] And as detailed above, the very same providers that are subject to Bureau regulation outside of bankruptcy become creditors with claims in a consumer's bankruptcy case.[306] Moreover, the history of the Dodd-Frank Act makes clear that many of the Act's protections were meant to operate in tandem with the Bankruptcy Rules.[307] If regulators carved out bankruptcy-related

301. *See, e.g.*, Randolph v. IMBS, Inc., 368 F.3d 726, 730–33 (7th Cir. 2004) (holding that the FDCPA can apply to address misconduct in bankruptcy); Haynes v. Chase Bank USA, N.A. (*In re* Haynes), No. 11-23212, 2014 WL 3608891, at *3 (Bankr. S.D.N.Y. July 22, 2014) (holding that FCRA applied to bankruptcy-related misconduct).

302. H.R. REP. NO. 111-517, at 730 (2010) (Conf. Rep.).

303. *See supra* Part II.

304. *See supra* note 117 and accompanying text (noting that debt collection has been identified as a "high risk" area for examination purposes).

305. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 3 (1986).

306. *See supra* Section II.A.2.

307. *See* Frederick Tung et al., *Consumer Bankruptcy Panel: Recent Developments in Bankruptcy Regulation: Mortgage Servicing Rules, the FDCPA, and the CFPB*, 32 EMORY

creditor conduct from the Bureau's regulatory activities, the result would be to provide debtors in bankruptcy, a particularly vulnerable class of consumers, fewer protections than their non-bankrupt counterparts.[308]

As described in more detail in Part II, above, the Bureau can regulate many bankruptcy-related activities without conflicting with the Bankruptcy Code.[309] The Supreme Court has underscored that federal statutes with overlapping application should be harmonized wherever possible.[310] "When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed."[311] 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.'"[312]

Applying this principle, most courts have held that federal consumer protection laws, including the FDCPA, RESPA, FCRA, and TILA, can potentially remediate bankruptcy-related harms.[313] Indeed, the Supreme Court recently had the opportunity to foreclose the application of the FDCPA in consumer bankruptcy cases, and declined to do so.[314]

The Supreme Court has likewise underscored that Congress might purposefully layer complementary enforcement regimes as part of a broader legislative scheme. In *POM Wonderful LLC v. Coca Cola Co.*,[315]

BANKR. DEV. J. 303, 322–24 (2016) (during a panel discussion, Sarah Mancini, Of Counsel for the National Consumer Law Center and an attorney for Atlanta Legal Aid, noted that RESPA, TILA, the Dodd-Frank Act's amendments to those statutes, and the CFPB rules promulgated as a result are meant to "walk[] hand in hand" with bankruptcy's procedural rules).

308. *See supra* Part II.

309. The Bureau's existing regulation of periodic mortgage statements provides a prime example of how the Bureau's rulemaking activities can harmonize with the Bankruptcy Code and Rules, providing borrowers in bankruptcy with all of the protections available to their non-bankrupt counterparts. *See supra* notes 84–100 and accompanying text.

310. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 673 (2007) (Stevens, J., dissenting); J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001); Morton v. Mancari, 417 U.S. 535, 551 (1974).

311. Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004).

312. Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality opinion) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

313. *See, e.g.*, Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1342 (11th Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1407 (2017); Simon v. FIA Card Servs, N.A., 732 F.3d 259, 274 (3d Cir. 2013); *Randolph*, 368 F.3d at 730; *see also* Bruce, *Debt Buyers Beware*, *supra* note 6, at 5–6 (discussing these arguments). Several cases that come to a contrary conclusion analyze the matter as one of federal preemption rather than implied repeal and are improperly decided. *See* Bruce, *Debt Buyers Beware*, *supra* note 6, at 6–8 (discussing the weaknesses in the analysis of *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002), among other cases).

314. *See Midland Funding*, 137 S. Ct. at 1415–16; *see also* Kara Bruce, *The Supreme Court's 2017 FDCPA Rundown*, BANKR. L. LETTER (Thomson Reuters, St. Paul, Minn.), Sept. 2017, at 1, 6–7 (discussing matters left open by the Court's narrow decision in *Midland Funding*).

315. 573 U.S. 102 (2014).

the Court permitted competitors to bring private claims for unfair competition under the Lanham Act, even though the Food and Drug Administration (FDA) regulated juice labeling as part of the Food, Drug, and Cosmetics Act.[316] The Court reasoned that the Lanham Act and the Food, Drug, and Cosmetics Act had distinct, but complementary goals. "Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the [Food, Drug, and Cosmetics Act] protects public health and safety."[317] The Court further noted that the enforcement structures built into these statutes also complement one another.[318] Indeed, allowing the Lanham Act to augment the Food, Drug, and Cosmetic Act with a private right of action "takes advantage of synergies among multiple methods of regulation" and "is quite consistent with . . . congressional design."[319] As noted earlier, consumer bankruptcy and consumer financial protection have policy and practical synergies that lend themselves to this kind of collaboration.

The Bureau's examination and rulemaking authority does not duplicate the work of any bankruptcy regulator. As noted, bankruptcy's overseer, the USTP, has limited information-gathering and policy-setting authority.[320] As such, the Bureau's efforts to engage in these tasks might bring welcome clarity and consistency to consumer bankruptcy regulation.[321]

Further, a number of structural limits prevent the Bureau from overreaching into consumer bankruptcy. First, the Administrative Procedure Act permits notice-and-comment rulemaking and requires the Bureau to consider comments that raise a potential conflict with federal statutes.[322] For example, when the Bureau issued regulations for mortgage servicers in bankruptcy, the notice-and-comment period permitted interested parties to raise concerns about interference with the automatic stay, which the agency considered and addressed with bankruptcy-specific modifications.[323] Notice-and-comment rulemaking does not eliminate conflict concerns, but it does afford interested parties the opportunity to voice such concerns and compels the Bureau to consider them.[324] And, if the Bureau creates a rule that interest holders

316. *Id.* at 106.

317. *Id.* at 115.

318. *Id.*

319. *Id.* at 115–16.

320. *See supra* notes 292–299 and accompanying text.

321. *See* Rao, *supra* note 100, at 17 (discussing how the Bureau's mortgage servicing rules represent an effort to harmonize the Bankruptcy Code with overlapping consumer protection law).

322. *See* Administrative Procedure Act § 4, 5 U.S.C. § 553 (2012) (prescribing rulemaking process).

323. *See supra* Section II.A.2.

324. *See* 5 U.S.C. § 553(b)–(c) (requiring notice and comment on proposed agency rules).

believe poses a conflict, then the APA provides procedures for challenging it.[325]

To be sure, enhanced Bureau activity in consumer bankruptcy runs the risk of over-enforcement of consumer laws. But the model proposed below is crafted to address gaps the consumer bankruptcy system cannot. This model constrains the Bureau's activities to adjunct regulation rather than concurrent regulation, permitting it to use its authority to promote equity and efficiency in consumer bankruptcy.

IV. A Model for Adjunct Regulation

This Article has so far explored the scope of the Bureau's current activities in bankruptcy and made the case that the Bureau might deploy its regulatory tools to address systematic bankruptcy misconduct. This Part sketches a blueprint for how the Bureau could more purposefully exercise its statutory authorities for the benefit of consumer bankruptcy. Because the Bureau's recent leadership and structural changes render much of this proposal aspirational in the near term, this Part also suggests how other enforcers—state regulators and private litigants—can fill regulatory gaps.

A. *An Aspirational Bankruptcy-Focused Regulatory Blueprint*

A well-functioning regulatory system relies on strong information-gathering resources and consultation with experts and stakeholders to achieve strategic regulatory priorities. As such, data and consultation should form the foundation of the Bureau's bankruptcy-focused regulatory agenda. First, the Bureau should use its intelligence-gathering toolkit to collect and analyze market-wide information about bankruptcy-related misconduct. Second, the Bureau, in consultation with the USTP, should use the information gathered to set bankruptcy-specific examination priorities. If these phases uncover misconduct requiring either entity-specific or market-wide regulatory responses, the Bureau should pursue targeted enforcement and rulemaking agendas that address them. Throughout this process, the Bureau should consult with bankruptcy's other stakeholders, including case trustees, debtors' attorneys, consumers and industry groups, and the USTP, to refine the focus of its activities and to avoid overreaching.[326]

325. *See id.* § 706 (articulating the scope of judicial review that applies to agency actions).

326. The Bureau can engage with case trustees through national organizations such as the National Association of Chapter 13 Trustees and National Association of Trustees, consumer debtor attorneys through the National Association of Consumer Bankruptcy Attorneys, and industry through a variety of national membership-based associations.

1. Step One: Information Gathering

As described in Part II, the Bureau has a variety of information-collecting tools at its disposal. These resources could yield critical data to provide a foundation for setting more precise, bankruptcy-focused regulatory priorities. The Bureau should use these tools, in robust consultation with other regulatory actors, to identify patterns of bankruptcy-related misconduct.

The Bureau's consumer complaint database is a key source of information that the Bureau can use to identify problematic conduct. The Bureau uses this database for myriad purposes. Not only does it "collect[], investigat[e], and respond[] to [individual] consumer complaints,"[327] it also uses the complaint data for regulatory purposes. It analyzes the complaint data to inform supervision and examination, rulemaking, and enforcement priorities.[328] It also shares complaint data with state and federal agencies.[329]

A recent search of the complaint database using the word "bankruptcy" produced 20,117 complaints.[330] That search subdivided the results by 17 products or sub-products and roughly 120 issues or sub-issues, most of which relate to the bankruptcy process.[331] These results indicate that consumers are turning to the database for assistance with debt that is or has been administered in bankruptcy. The Bureau could study these complaints to identify patterns of potential misconduct, paying particular attention to bankruptcy's various trigger points—areas in which a creditor's risk of noncompliance may be high. We identify several such areas in Part III, including the proof-of-claim process, servicing of debt in chapter 13 cases, and post-discharge debt servicing and reporting. Ongoing and periodic reviews of the data might reveal patterns of bankruptcy-related misconduct by certain creditors or across a particular market.

The Bureau could share its non-public complaint data and analysis with the USTP through an interagency working group. Consultation with government stakeholders is a hallmark of the Bureau's operations. And, considering the USTP's authority to serve as bankruptcy's "watchdog,"

---

327. 12 U.S.C. § 5511(c)(2) (2012). The Bureau's Office of Consumer Response, a mandated unit, centralizes, monitors, and responds to these complaints. *Id.* § 5493(b)(3)(A).

328. *See id.* § 5511(b).

329. *See* Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 897 (2015).

330. *Consumer Complaint Database*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?from=0&has_narrative=true&searchField=all&searchText=bankruptcy&size=25&sort=created_date_desc [https://perma.cc/U77K-Z34C]. At the time of this search, the database contained 1,420,970 total entries. *Id.*

331. *Id.*

it is an ideal partner for the Bureau.[332] While the USTP could benefit greatly from the Bureau's broad information-gathering tools, it could also contribute its bankruptcy expertise and the front-line intelligence supplied by its field attorneys. This working-group model provides the Bureau and the USTP with a forum for determining whether the patterns detected in the data warrant regulatory action. It also ensures that the strategic bankruptcy priorities set and the regulatory actions that ensue are done collaboratively with bankruptcy's primary overseer.

The Bureau could also publish a bankruptcy-specific "Complaint Snapshot" to publicize issues affecting the bankruptcy process. The Bureau periodically publishes Complaint Snapshots that "provide[] a high-level overview of trends in consumer complaints" over a particular period.[333] These reports often isolate and analyze the complaints in a particular market line, such as mortgage servicing or debt collection.[334] Publishing a bankruptcy-focused Complaint Snapshot is a key example of how the Bureau can support bankruptcy's regulators without overreaching. The Bureau's data and analysis on bankruptcy-specific complaints can crystalize issues that bankruptcy's existing regulators have difficulty discovering on a case-by-case basis. Then, bankruptcy's enforcers can leverage this information to enforce bankruptcy laws within the confines of bankruptcy's remedial scheme.

To be sure, the use of non-public complaint data to set regulatory priorities might draw criticism, because the data presents one-sided stories and may not be representative of all consumers' bankruptcy experiences.[335] But even so, this database provides a valuable starting point for the Bureau and USTP to detect patterns that may warrant additional study.[336] Other information-gathering tools, such as the Bureau's division of Research, Markets, and Regulation (RMR), might provide a more comprehensive source of intelligence on market-wide trends in consumer finance.[337]

---

332. *See* Leonard Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1159–60 (2012) (noting that the Bureau has hired and solicited input from other government leaders).

333. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, COMPLAINT SNAPSHOT: MORTGAGE 2–3 (2019).

334. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, COMPLAINT SNAPSHOT: DEBT COLLECTION 11–12 (2018); CONSUMER FIN. PROT. BUREAU, *supra* note 333, at 10.

335. *See generally* CONSUMER FIN. PROT. BUREAU, *supra* note 334 (discussing these issues).

336. *See* Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 182 (2017) (describing how the Bureau's complaint database includes "information and analysis about complaint numbers, complaint types, and . . . information about resolution of complaints").

337. *See* 12 U.S.C. § 5493(b)(1) (2012) (mandating a research, analysis, and reporting unit); *id.* § 5512(c) (requiring the Bureau to monitor for risks to consumers in the offering or provision of consumer financial products or services).

The RMR division monitors consumer financial markets and conducts market research.[338] RMR is meant to provide the Bureau with a research-driven, evidence-based perspective on consumer financial markets, consumer behavior, and regulation.[339] The Bureau gathers this information by issuing notices of Requests for Information (RFI) in the Federal Register, which in turn seek comment from a variety of stakeholders, including consumers and industry, on market-wide conduct.[340] The Bureau uses RFIs to collect information from the public to generate topical reports,[341] set supervisory priorities,[342] and frame rulemaking efforts.[343] The Bureau can also require regulated entities to provide a variety of information to fulfill these functions.[344]

The Bureau could issue RFIs to gain information from bankruptcy's stakeholders about specific weaknesses in bankruptcy regulation. First, the Bureau could consult with the USTP to identify topics and questions appropriate for an RFI. Next, the RFIs could seek input from diverse bankruptcy stakeholders including case trustees, consumers and consumer debtor attorneys, and industry groups. The Bureau could share analysis from these data with the USTP working group to inform internal efforts to address bankruptcy misconduct. It could also apply these data to set bankruptcy-specific priorities for supervision and examination.[345]

---

338. *Research, Markets & Regulations*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/research-markets-regulation/ [https://perma.cc/SK4H-WM2S].

339. *Id.*

340. *See, e.g.*, 12 U.S.C. § 5511(c); Request for Information Regarding the Small Business Lending Market, 82 Fed. Reg. 22,318-01, 22,318 (May 15, 2017). Voluntary submissions in response to a CFPB RFI are part of the public record and subject to public disclosure. Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information, 83 Fed. Reg. 9,499, 9,499 (Mar. 6, 2018). Material that covered persons submit to the CFPB under this compulsory process retains its privileges and confidentiality. 12 U.S.C. §§ 1785(j), 1828(x); 12 C.F.R. § 1070.48(a) (2019) ("The submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB.").

341. *See, e.g.*, KENNETH P. BREVOORT & MICHELLE KAMBARA, CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: BECOMING CREDIT VISIBLE 5 (2017); *The Impact of Differences Between Consumer- and Creditor-Purchased Credit Scores*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/research-reports/the-impact-of-differences-between-consumer-and-creditor-purchased-credit-scores/ [https://perma.cc/H527-B8S2].

342. *See* 12 U.S.C. § 5493(b)(3)(D).

343. *See id.* § 5512.

344. *See id.* § 5512(c)(4)(b)(ii).

345. *See* Littwin, *supra* note 329, at 902–03 (explaining how the Bureau can use complaints to inform supervision and examination priorities).

2. Step Two: Setting and Executing on Supervision Priorities

The Bureau's examination and supervision authority builds on this foundation of information gathering. It provides targeted opportunities to gather additional information from supervised entities, while also encouraging compliance. The information gathered through this process might also inform specific enforcement and rulemaking priorities or directly support USTP enforcement activities.

As described in Part II, the Bureau's Examination manual already directs examiners to gather information on several key areas that implicate bankruptcy, such as mortgage servicing, debt collection, and credit reporting.[346] The Bureau could consult with the USTP to develop these areas with more precise questions or to add additional topics. By embracing these aspects of examination and sharing the products of examination with bankruptcy enforcers, the Bureau can leverage its supervision authority to uncover more bankruptcy non-compliance than is currently detected.

While supervision is a resource-intensive dimension of the Bureau's operations, this proposal does not meaningfully expand the Bureau's supervisory activities. Instead, this proposal simply puts a finer point on the bankruptcy-specific supervision that the Bureau already pursues. This increased bankruptcy-specific supervision has potential to compel compliance both from the supervised entities and across the market as a whole. For example, if the Bureau discovers that a creditor's policies and procedures are deficient, the Bureau can obtain corrective action or initiate an enforcement action against that creditor. The Bureau can also signal to other market actors—through its "Supervisory Highlights"—conduct the Bureau wishes to prevent. This might prompt those parties to adjust their compliance management systems to conform. In both cases, the Bureau targets compliance problems at an institutional level, rather than through an individual case.[347]

3. Step Three: Enforcement & Rulemaking

With the strong foundation of information drawn from consumer complaints, market research, and examination, the Bureau could develop enforcement and rulemaking priorities to fill bankruptcy's remedial

346. *See supra* Section II.B.2.b.

347. While the confidentiality of the supervision process is a potential weakness because of the possibility of agency capture, where it functions as intended, it has potential to reduce harm in the bankruptcy system on a widespread basis. *See* Braucher & Littwin, *supra* note 111, at 88 (defining regulatory capture as where "a regulated industry has disproportionate influence over its regulator").

gaps.[348] As explained above, bankruptcy's remedial scheme is poorly equipped to address widespread but small-value misbehavior.[349] Acting as an adjunct regulator, the Bureau could deploy its enforcement and rulemaking authority over federal consumer financial law in ways that are targeted to address such conduct.

The Bureau's enforcement action against Ocwen, described above, provides a framework for studying how the Bureau might use its enforcement authority to improve compliance with bankruptcy law.[350] In that case, the Bureau detected harms to debtors in bankruptcy in its ongoing supervision of Ocwen's operations.[351] The Bureau leveraged this information to launch an enforcement action targeting Ocwen's improper conduct both inside and outside of bankruptcy.[352] This enforcement action resulted in a consent order that prohibited Ocwen from engaging in specific violations of bankruptcy law.[353]

This type of enforcement has the potential to improve compliance of both the target of the enforcement action and other market participants. The penalties issued and consent agreements reached are calibrated to deter the regulated entity from repeating such conduct in the future. But the settlement terms of consent orders offer other regulated entities guidance about the kinds of practices the Bureau deems improper and might encourage them to adjust their practices to conform.

To maximize the regulatory potential of consent orders in bankruptcy, the Bureau should include provisions, informed by the USTP, that unambiguously address any bankruptcy dimensions of the defendant's conduct. The *Ocwen* consent order, for example, prohibited Ocwen from engaging in specific bankruptcy conduct.[354] In contrast, the Bureau's recent consent orders with large debt buyers, discussed in Part II above, do not expressly state that they encompass consumer bankruptcy

---

348. *See* Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2563–64 (2019) (explaining the symbiosis of rulemaking, supervision, and enforcement).

349. *See supra* Section III.A.2.

350. *See supra* Section II.C.2.

351. *See supra* note 177 and accompanying text. These efforts might also have been informed by the consumer complaint database, which lists more than 23,000 complaints involving "Ocwen" filed before 2017. *See Consumer Complaint Database*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?from=0&searchField=all&searchText=&size=25&sort=created_date_desc [https://perma.cc/F35X-N7LL] (filter results by typing "Ocwen" into search bar; narrow date CFPB received the complaint to through "12/31/2016").

352. *See* Complaint at 1, *supra* note 179, at 6–7.

353. *See supra* Section II.C.2.

354. *See* Consent Judgment, *supra* note 178.

issues.[355] Although these latter orders are written using sweeping language that prohibits the collection of time-barred debt through "any means,"[356] creditors have previously argued that filing proofs of claim in bankruptcy does not qualify as a form of debt collection.[357] To be sure, this argument has not gained much traction in the courts, and the consent orders would thus likely be construed as covering bankruptcy-related debt collection.[358] But drafting consent orders with their bankruptcy implications squarely in focus would eliminate the need for clarifying litigation over similar matters in the future.

The Bureau might also fill bankruptcy's regulatory gaps through targeted rulemaking activities. The Bureau's rulemaking is characterized by evidenced-based decision making.[359] These underpinnings ensure that the Bureau does not tread into bankruptcy without clear and intentional direction. Further, the rulemaking process invites input during the notice-and-comment period, affording the Bureau opportunities to consult with bankruptcy stakeholders on development and implementation of a rule.[360]

In May 2019, the Bureau issued a notice of proposed rulemaking on the FDCPA provisions governing the activities of certain debt collectors.[361] And later, in March 2020, the Bureau issued a supplemental notice of proposed rulemaking seeking comment on proposed disclosures relating to the collection time-barred debt.[362] This initiative provides a prime opportunity for the Bureau to craft regulations with the bankruptcy process in mind. As Part II discusses, the debt-collection industry

---

355. *See supra* Section II.C.2. As described in Part II, the language in these orders, broadly construed, could reach bankruptcy, but greater specificity would eliminate any room for doubt. *See supra* Part II.

356. *See, e.g.*, Encore Capital Grp., Inc., CFPB No. 2015-CFPB-0022, at 38–39 (broadly prohibiting the collection of time-barred debt through "any means").

357. *See, e.g.*, *In re* Dubois, 834 F.3d 522, 527 (4th Cir. 2016).

358. *See, e.g.*, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1415–16 (2017) (implicitly recognizing that filing a proof of claim is a form of debt collection); Heintz v. Jenkins, 514 U.S. 291, 294 (1995) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." (quoting BLACK'S LAW DICTIONARY 263 (6th ed. 1990))); Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014) ("[W]e conclude that [the] filing of the proof of claim fell well within the ambit of a 'representation' or 'means' used in 'connection with the collection of any debt.'").

359. *See* 12 U.S.C. § 5511(c)(3) (2012); Kennedy et al., *supra* note 332, at 1155–58 (discussing the Bureau's data-driven approach to regulation); *see also* 12 U.S.C. § 5512(c) (requiring Bureau monitoring for rulemaking purposes, among others).

360. *See supra* notes 337–62 and accompanying text.

361. *See* Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,274 (May 21, 2019) (to be codified at 12 C.F.R. pt. 1006); Kelly Cochran, *Fall 2018 Rulemaking Agenda*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/blog/fall-2018-rulemaking-agenda/ [https://perma.cc/KZM3-EYHY] (stating that the debt collection market "remains a top source of complaints to the Bureau").

362. *See* Debt Collection Practices (Regulation F), 85 Fed. Reg. 12,672–12,702 (Mar. 2, 2020) (to be codified at 12 C.F.R. pt. 1006).

operates in a manner that can lead to significant non-compliance with bankruptcy law and procedure.[363] For example, when creditors assign debt without sufficient accompanying information, debt collectors do not have the tools to comply with bankruptcy's requirements.[364] In addition, bankruptcy's structural limitations provide opportunities for debt buyers to systematically collect stale debt in bankruptcy.[365] Neither the proposed nor the supplemental proposed rules specifically address most bankruptcy-related dimensions of the FDCPA, other than to propose that FDCPA regulations prohibit the sale or transfer of discharged debt.[366] The proposed rule would prohibit a debt collector from suing or threatening to sue a consumer to collect a time-barred debt, but the rule does not specify whether that ban reaches the bankruptcy process.[367] Similarly, the proposed rule makes no significant changes to aspects of the FDCPA that interface with the consumer bankruptcy process, such as the FDCPA's debt verification and mini-Miranda requirements,[368] which potentially intersect with the bankruptcy claims process, the automatic stay, and the discharge. The Bureau, in consultation with the USTP, should use the rulemaking process to address bankruptcy-specific FDCPA violations and draft a final rule that encompasses these bankruptcy-specific quality-control issues.

B. *In the Near Term: Relying on Existing Enforcers*

The recent leadership and structural changes at the Bureau place this proposed regulatory strategy out of reach for now.[369] In recent years, the

363. *See supra* Section III.B.2.

364. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 367–68.

365. *See supra* Section III.B.2. Indeed, as we discuss in more detail in other writings, stale debt is currently worth more in bankruptcy than it is outside of bankruptcy, based on these regulatory shortcomings. *See* Bruce & Sickler, *Private Remedies Post*-Midland, *supra* note 6, at 375.

366. Debt Collection Practices (Regulation F), 84 Fed. Reg. at 23,276.

367. *See id.* at 23,275–76 ("The Bureau proposes . . . [t]o prohibit, with certain exceptions, the sale, transfer, or placement for collection of a debt if a debt collector knows or should know that the debt has been paid or settled or has been discharged in bankruptcy, or that an identity theft report has been filed with respect to the debt.").

368. *See id.* at 23,380 (analyzing proposed provisions that prohibit unfair and misleading debt collection practices and clarifying debt collection disclosure requirements).

369. Interim Director Mick Mulvaney attempted to rename the Bureau, redefine its mission, and move units within the agency to diminish their work during his brief tenure. *See* John L. Culhane, Jr., *Mulvaney to Reorganize CFPB Office of Students and Young Consumers and Take Other Actions*, CONSUMER FIN. MONITOR (May 10, 2018), https://www.consumerfinancemonitor.com/2018/05/10/mulvaney-to-reorganize-cfpb-office-of-students-and-young-consumers-and-take-other-actions/ [https://perma.cc/2LDZ-2TMV] (announcing the Office of Students and Young Consumers and the Student Loan Ombudsman will move to the Office of Financial Education); Renae Merle, *The CFPB Tried to Change Its Name. Here's Why it's Giving up.*,

Bureau's leadership has doggedly focused on reining in the Bureau's authority and stripping away Obama-era regulations.[370] Limited rulemaking,[371] an enforcement slowdown,[372] and less expansive supervision[373] characterize the agency's current operations.[374] Yet our observations on the Bureau's relationship with bankruptcy will hold true into the future, when the CFPB's leadership might be more motivated to act. In the meantime, this Part sketches how other regulators, including state attorneys general (SAGs) and private litigants, can serve as a stopgap to reduce harm to consumers in bankruptcy.

WASH. POST (Dec. 19, 2018, 1:47 PM), https://www.washingtonpost.com/business/2018/12/19/cfpb-tried-change-its-name-heres-why-its-giving-up/ [https://perma.cc/Z5GY-JGPK] (noting the Bureau's name did not change); *see also* Letter from Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, to CFPB Employees (Jan. 23, 2018) (redefining the scope of the Bureau's mission), https://www.documentcloud.org/documents/4357880-Mulvaney-Memo.html [https://perma.cc/6RNM-CFPX]; Christopher J. Willis, *Mulvaney Reorganizes CFPB Office of Fair Lending*, CONSUMER FIN. MONITOR (Feb. 1, 2018), https://www.consumerfinancemonitor.com/2018/02/01/mulvaney-reorganizes-cfpb-office-of-fair-lending/ [https://perma.cc/RVK9-P6Q6] (describing Director Mulvaney's internal email announcing the transfer of the Office of Fair Lending and Equal Opportunity (OFLEO) from the Supervision, Enforcement and Fair Lending Division (SEFL) to the Director's Office to focus on advocacy, coordination, and education and to move the Office of Consumer Response from the Operations Division to the Community Education and Engagement Division); *Introducing Our New Bureau Seal*, CONSUMER FIN. PROTECTION BUREAU (Mar. 30, 2018), https://www.consumerfinance.gov/about-us/blog/introducing-our-new-bureau-seal/ [https://perma.cc/5ZYJ-BSTK] (recreating the Bureau of Consumer Financial Protection's seal to reflect its mission).

370. *See, e.g.*, Kate Berry, *CFPB's Mulvaney Looks to Rein in 'Tyranny' of Agency He Runs*, AM. BANKER (Apr. 2, 2018, 3:33 PM), https://www.americanbanker.com/news/cfpbs-mulvaney-looks-to-rein-in-tyranny-of-agency-he-runs [https://perma.cc/LQB8-5LUQ] (describing then-director Mulvaney's efforts to constrain Bureau authority); *Consumer Financial Protection Bureau Releases Notices of Proposed Rulemaking on Payday Lending*, CONSUMER FIN. PROTECTION BUREAU (Feb. 6, 2019), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-notices-proposed-rulemaking-payday-lending/ [https://perma.cc/7HKM-C2NC] (proposing to rescind portions of the payday lending rule enacted in early 2017).

371. Any substantive rulemaking is thin and limited mostly to reconsidering the payday lending rule, HDMA data collection, and continuing work on the existing debt collection rule, per the Bureau's Fall 2018 rulemaking agenda. *See* Cochran, *supra* note 361.

372. *See* Evan Weinberger, *Enforcement Slowdown Defines Mulvaney's CFPB Tenure (1)*, BLOOMBERG L. (Nov. 23, 2018, 5:31 AM), https://news.bloomberglaw.com/banking-law/enforcement-slowdown-defines-mulvaneys-cfpb-tenure-1 [https://perma.cc/DV4D-7L2T].

373. The Bureau no longer supervises banks and other entities for compliance with the Military Lending Act after Interim Director Mulvaney determined that the Dodd-Frank Act did not give the Bureau the authority to do so. *See* Glenn Thrush, *Mulvaney Looks to Weaken Oversight of Military Lending*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html [https://perma.cc/5P7D-LJPG] (reporting that the CFPB is suspending routine supervisory examinations for compliance with the Military Lending Act).

374. *See generally* McCoy, *supra* note 348 (explaining how attacks on the CFPB's rulemaking, supervision, and enforcement powers have eroded its authority).

States wield an arsenal of enforcement powers to fill the void left by the Bureau's current inactivity. State attorneys general (SAGs) have long enforced consumer protection and are a vital partner to the federal government in consumer financial protection.[375] Moreover, the Dodd-Frank Act gives States concurrent power to enforce some federal consumer financial laws against many of the entities within the Bureau's purview.[376] SAGs' dual enforcement authority reaches much of the substantive law the Bureau enforces, including "the general UDAAP ban, other federal consumer financial protection laws, and new substantive limits on mortgage terms."[377] The Dodd-Frank Act also relaxed federal preemption rules, expanding states' ability to enforce laws that provide greater protections than federal law.[378] As such, state UDAP statutes remain an important tool for ensuring consumer financial protection.[379] As discussed in Part II, efforts to ensure greater compliance with general consumer protection regulation can have pronounced spillover effects in bankruptcy.

Private litigants, including debtors in bankruptcy and case trustees, can also serve as a regulatory resource in times of Bureau under-enforcement.[380] Many of the enumerated consumer laws feature private rights of action combined with consumer-friendly litigation incentives,

375. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 707–08 (2011) (noting the unique authority SAGs have to enforce federal law). *See generally* Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115 (2013) [hereinafter Totten, *Credit Reform*] (tracing the history of states' roles in consumer financial protection and detailing the substantive, procedural, and remedial powers the Dodd-Frank Act gives SAGs); Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611 (2015) (analyzing how the concurrent powers that Congress gave SAGs positions them as stopgaps when federal regulators fail to act, but allows them to alter the quality of enforcement in unique ways); Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53 (2011) (examining the ways SAGs use federal consumer protection laws); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893 (2011) (explaining the numerous powers the Dodd-Frank Act gave states to supplement the CFPB's rulemaking and enforcement efforts).

376. 12 U.S.C. § 5552(a)(2)(B) (2012). There is one significant exception—States cannot sue to enforce federal consumer financial laws against federally-chartered banks and savings associations, but they can sue to enforce Bureau rules. *Id.* § 5552(a)(2)(A).

377. Totten, *Credit Reform*, *supra* note 375, at 131.

378. *See* 12 U.S.C. §§ 25b(b), 1465(b); Wilmarth, *supra* note 375, at 925–35 (explaining the Dodd-Frank Act's revised preemption rules).

379. *See generally* Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37 (2018) (examining every UDAP matter resolved by state and federal enforcers in 2014 and categorizing the different approaches).

380. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661 (2013) (discussing the use of public and private enforcement as complementary); *see also* Bruce, *Enforcement Gap*, *supra* note 6, at 496–98 (discussing the role of private enforcement as a regulatory tool in the United States); Glover, *supra* note 291, at 1153.

including statutory damages and attorney's-fee provisions.[381] These statutes encourage attorneys to pursue cases on behalf of consumers who ordinarily cannot match the resources of their adversaries.[382] As we discuss in other writings, these provisions can fill in remedial gaps left open by the Bankruptcy Code.[383] And, as mentioned above, most courts have held that federal consumer protection law can apply to address bankruptcy-specific harms.[384] As such, as long as the Bureau does not perform its functions as Congress intended, bankruptcy participants can continue to exercise any rights they might have under these laws as well as any state UDAAPs that allow for private enforcement.

The Bureau has a vast amount of publicly available information to guide state and private enforcers in their enforcement efforts. For example, the Bureau has published a variety of market studies that identify practices it believes to be harmful.[385] The Bureau's Examination Manual, while intended for examiners, also provides a blueprint of conduct that might pose consumer protection problems.[386] Relatedly, past Supervisory Highlights feature examples of misconduct that the Bureau has discovered in its past examinations.[387] And finally, the current consumer complaint database aggregates narratives that consumer-financial-protection stakeholders might search to identify patterns involving bankruptcy-related conduct.[388] State and private regulators can mine this body of work to support their enforcement efforts.

For example, a consumer debtor's attorney might discover an issue of creditor non-compliance recurring in a small collection of her clients' bankruptcy cases. She could search the Bureau's resources to determine whether that conduct has been identified as a problem in past examination or market studies. These resources might also help explain market trends that have contributed to the problem.[389] The attorney could also search or

381. *See, e.g.*, 15 U.S.C. § 1640(k)(2)(A) (2012) (codifying TILA private right of action); *id.* § 1692k(a)(3) (codifying FDCPA private right of action); *id.* § 1691e(d) (codifying Equal Credit Opportunity Act private right of action); *id.* §§ 1681i, 1681s-2(b), 1681n, 1681o (codifying FCRA private rights of action).

382. *See* Bruce, *Enforcement Gap*, *supra* note 6, at 498–99.

383. *Id.* at 501.

384. *See supra* Section III.B.2.

385. *See, e.g.*, *Research and Reports*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/research-reports/ [https://perma.cc/5NV7-K4MN] ("We study how consumers interact with financial products and services to help identify potential problems in the marketplace and achieve better outcomes for all.").

386. *See supra* note 116 and accompanying text.

387. *See generally* CONSUMER FIN. PROT. BUREAU, *supra* note 113.

388. *See supra* notes 327–32 and accompanying text.

389. For example, pervasive under-compliance by third-party debt collectors might signal that certain information has not been transferred with the assignments of those debts. *See supra* Section II.B.2.c (discussing similar issues).

browse through[390] the public consumer complaint database to identify patterns in the complaints that have so far escaped Bureau attention. And, she or her client might also contribute their knowledge to the complaint database to signal other regulators about the problem. In this manner, the Bureau's existing body of work can provide a gateway to grassroots-level consumer protection.

CONCLUSION

Since its creation, the Consumer Financial Protection Bureau has operated behind the scenes in consumer bankruptcy cases. These activities are perhaps not surprising, considering the breadth of the Bureau's mission and the centrality of bankruptcy to consumer finance law. This Article seeks to make explicit the role the Bureau plays in bankruptcy and embrace its potential as an adjunct regulator.

390. The database is coded by topic.