

CLOSING CONSUMER BANKRUPTCY'S ENFORCEMENT GAP

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I. INTRODUCTION

The consumer bankruptcy process functions on economies of scale. In order to maintain a relatively low cost of access to the bankruptcy forum, attorneys, judges, private trustees, and other bankruptcy professionals typically handle massive caseloads in a fairly routine manner.¹ This structure has its benefits, but it is vulnerable to opportunistic behavior. Some repeat players—large lenders and servicers with thousands of borrowers in bankruptcy—may take advantage of the lack of direct oversight to extract undue benefits from the bankruptcy system.²

In several recent articles, I have explored attempts by debtors, their attorneys, and chapter 7 and 13 trustees to address this weakness in the bankruptcy structure through private lawsuits.³ Some debtors' attorneys and

¹ See, e.g., William C. Whitford, *The Ideal of Individualized Justice: Consumer 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.”); 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.”); HENRY J. SOMMER ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE 81 (John Rao ed., 8th ed. 2006) (“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.”). But see Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, AM. BANKR. INST. L. REV., Spring 2012, at 17, 121–122 (noting that, especially after enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), “there are ever fewer seemingly simple cases”).

² See *infra* Part II(A).

³ See Kara Bruce, *Debt Buyers Beware: Filing Proofs of Claim for Time-Barred Debt in the Eleventh Circuit and Beyond*, BANKR. LAW LETTER, June 2016, at 1, 1 [hereinafter Bruce, *Debt Buyers Beware*]; Kara Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 445 (2016)

case trustees have attempted to bring class action lawsuits on behalf of debtors in bankruptcy. Others have looked beyond the Bankruptcy Code's remedies, bringing suit under the Fair Debt Collection Practices Act (FDCPA), Real Estate Settlement Procedures Act (RESPA), and a host of other federal or state consumer protection laws. Still others have called upon the courts to use their equitable powers to craft workable solutions to bankruptcy misconduct.

Taken together, these cases represent a movement to close consumer bankruptcy's enforcement gap through private litigation. Litigation is an essential component of the U.S. regulatory framework.⁴ Yet its use in bankruptcy is not at all well-defined, and novel attempts to employ private lawsuits have raised complicated jurisdictional and interpretive questions.⁵ More broadly, a popular distrust of private lawsuits has limited the availability of litigation-based solutions on a number of fronts, including through tort reform initiatives, limitations on the use of class actions, ratcheting up the pleading standards for federal cases, and broadly permitting federal preemption of state law causes of action.⁶

This essay seeks to unify the attempts from the trenches to address consumer bankruptcy's enforcement gap with the vast body of theoretical literature on the utility of private enforcement. To be sure, private enforcement is not perfect, and it cannot solve all of consumer bankruptcy's problems. This essay considers private lawsuits, warts and all, and concludes that they might be an effective deterrent to certain types of undesirable behavior in the consumer bankruptcy context. Several key points underly this conclusion: First, private lawsuits should not be viewed solely as profit-motivated vigilantism. On the contrary, private litigation often serves a deliberate purpose in a broader regulatory regime. Second, several unique aspects of bankruptcy procedure limit the drawbacks traditionally associated with the use of private litigation to further consumer protection goals. As such, embracing private litigation in bankruptcy might

[hereinafter Bruce, *Vindicating*]; Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 21, 25–42 (2013) [hereinafter Bruce, *Debtor Class*].

⁴ See *infra* Part III.A.

⁵ See, e.g., Bruce, *Debtor Class*, *supra* note 3, at 43–44 (discussing the jurisdictional and interpretive questions associated with debtor class actions); Bruce, *Debt Buyers Beware*, *supra* note 3, at 1 (discussing the extent to which non-bankruptcy causes of action can address bankruptcy-related harms).

⁶ See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1160–75 (2012).

improve the enforcement of bankruptcy law and procedure. Third, several other shortcomings associated with litigation-based enforcement structures can be addressed through thoughtful attention to regulatory design.

This essay proceeds as follows: Part II highlights an enforcement gap in consumer bankruptcy cases and explains the structural realities that reinforce that gap. It briefly explores efforts of private litigants to bridge consumer bankruptcy's enforcement gap. Part III considers the historical and theoretical foundations of regulation through litigation. It argues that debtors in bankruptcy are uniquely capable, in contrast to other consumers, of vindicating their rights through private lawsuits. Part IV briefly outlines methods through which litigation-based enforcement structures could be developed in bankruptcy. It points to particular law reform initiatives that would improve both the prevalence and effectiveness of private enforcement in bankruptcy.

II. CONSUMER BANKRUPTCY'S ENFORCEMENT GAP

A. *Systematic Misuse of the Bankruptcy Process*

In several earlier articles, I have drawn attention to a pervasive problem of non-compliance with consumer bankruptcy law and procedure.⁷ For large institutional lenders and servicers—classic repeat players in the consumer bankruptcy sphere—it can be both convenient and lucrative to bend consumer bankruptcy's statutory provisions and procedural rules.⁸ These violations often pass through bankruptcy without redress, either because the parties to the bankruptcy case do not notice that they have occurred, or because the cost to address the problem overshadows the harm it caused.⁹

This reality came into sharp focus in the wake of the mortgage lending and foreclosure crisis, when mortgage servicers were discovered to be responsible for (among other things) robo-signing,¹⁰ rampant failures in

⁷ See *supra* note 3.

⁸ Bruce, *Debtor Class*, *supra* note 3, at 26–27.

⁹ *Id.* at 23.

¹⁰ See, e.g., *In re Rivera*, 342 B.R. 435, 463–64 (Bankr. D.N.J. 2006) (fining law firm for filing court pleadings in which the signature page had been pre-signed before review); *In re Schuessler*, 386 B.R. 458, 462 (Bankr. S.D.N.Y. 2008) (finding that lender's policy of automatically filing relief-from-stay motions when the debtor was two months behind in payment

documentation in proofs of claim¹¹ and motions for relief from stay,¹² and chronic deficiencies in standing to bring such matters before the court.¹³ Yet at the time of this writing, roughly ten years from the start of the Great Recession, new practices continue to develop in the dark corners of bankruptcy procedure.

One example that has attracted significant attention in recent years is the filing of proofs of claim¹⁴ to receive distribution on time-barred consumer debts.¹⁵ Debt buyers, which typically buy old debt for pennies on the dollar, have flooded the bankruptcy courts with proofs of claim asserting stale debt.¹⁶ Under § 502(a) of the Bankruptcy Code, proofs of claim are “deemed allowed unless a party in interest . . . objects.”¹⁷ This practice relies on the likelihood that trustees and other bankruptcy professionals will fail to detect every stale claim filed, or will not always devote the time and expense to objecting to those claims.¹⁸ Although this practice does not technically violate the Bankruptcy Code or the Federal Rules of Bankruptcy

process, without regard for past payments or the debtor’s equity in the property, warranted sanctions).

¹¹ See Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 144 (2008) (uncovering rampant errors in proofs of claim).

¹² Anne E. Wells, *Not in My House: Combating Unethical Mortgage Lender Practices and Related Attorney Misconduct in the Bankruptcy Courts*, 32 CAL. BANKR. J. 483, 487 (2013) (“Among the practices in the filing of motions for relief from stay or assertions of proofs of claim that have drawn the ire of the bankruptcy courts are: filing motions without the proper support, failure to review documents for accuracy, inaccurate record keeping, inability to explain their own records or practices, lack of attention to detail and quality of work, overcharges or impermissible fees or failure to properly credit payments, failure to follow court rules and procedures, misrepresentations and lack of candor with the court, and failure to admit culpability or take responsibility for mistakes.”).

¹³ See, e.g., *Nosek v. Ameriquet Mortg. Co. (In re Nosek)*, 386 B.R. 374, 383 (Bankr. D. Mass. 2008) (sanctioning loan originator and counsel for repeatedly misrepresenting to the bankruptcy court that originator was a holder of the note it had assigned); see also Porter, *supra* note 11, at 134.

¹⁴ A proof of claim is a simple document filed with the bankruptcy court to assert a claim to payment in a bankruptcy case. See Official Form 410, available at http://www.uscourts.gov/sites/default/files/form_b_410_16.pdf.

¹⁵ See Bruce, *Debt Buyers Beware*, *supra* note 3, at 3.

¹⁶ See *id.*

¹⁷ 11 U.S.C. § 502 (2012).

¹⁸ In order to object to a claim, a party must do so in writing and serve notice of the objection and hearing on multiple parties. See FED. R. BANKR. P. 3007(a). The objector might have to attend the hearing to obtain an order disallowing the claim. See *id.* A formal order must be prepared and served. FED. R. BANKR. P. 9022(a).

Procedure, it exploits a lack of oversight in the system and allows creditors to receive payment on debts that are subject to a complete defense.¹⁹

Other creditors have either failed or refused to remove debt that has been discharged in bankruptcy from borrowers' credit reports.²⁰ When discharged debt remains on a debtor's credit report, it can make it very difficult for a person to secure employment, housing, or credit.²¹ Some courts believe that creditors refuse to correct the credit report so that "the debtor will feel significant added pressure to obtain a 'clean' report by paying the debt."²²

As these types of issues have come to the fore, the bankruptcy system has attempted to fashion system-wide responses.²³ For example, the United States Trustee Program has carried out a number of enforcement efforts against lenders, servicers, and debt buyers.²⁴ In recent years, it has reached key settlements with several national mortgage servicers who violated bankruptcy law in hundreds of thousands of consumer cases.²⁵ In addition, a number of amendments to the Federal Rules of Bankruptcy Procedure require new disclosures aimed at making it more difficult for creditors to collect improper costs and fees, as well as debt for which the statute of limitations has run.²⁶

¹⁹ See Bruce, *Debt Buyers Beware*, *supra* note 3, at 3.

²⁰ See *Credit One Fin. v. Anderson (In re Anderson)*, 553 B.R. 221, 225 (S.D.N.Y. 2016).

²¹ See Jessica Silver-Greenberg, *Debts Canceled by Bankruptcy Still Mar Consumer Credit Scores*, N.Y. TIMES, Nov. 12, 2014, at A1.

²² *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, Nos. 11-23212 (RDD), 13-08370-rdd, 2014 WL 3608891, at *5 (Bankr. S.D.N.Y. July 22, 2014).

²³ I discuss more case-specific responses, such as private lawsuits challenging behavior and courts' efforts to sanction improper behavior, below.

²⁴ See, e.g., Dep't of Justice, 2015 EXECUTIVE OFF. FOR U.S. TR. ANN. REP. 11-13 [hereinafter U.S. TR. ANN. REP.], available at https://www.justice.gov/ust/file/ar_2015.pdf/download (detailing the UST Program's enforcement actions against mortgage servicers, unsecured creditors, and other bankruptcy participants who might prey on debtors in bankruptcy).

²⁵ See *id.* at 1 (noting that "[t]hose settlements provided more than \$130 million in relief to homeowners and addressed improper practices in bankruptcy by JPMorgan Chase Bank N.A. and Wells Fargo Bank N.A. that impacted about 100,000 homeowners").

²⁶ Rule 3002.1, which was adopted in 2011, requires the holder of a claim secured by a chapter 13 debtor's principal residence to file notice itemizing the fees, expenses, and other charges it seeks to recover from the debtor during the pendency of the bankruptcy case. FED. R. BANKR. P. 3002.1. This rule seeks to prevent the practice of carrying of undisclosed post-petition costs and fees through the bankruptcy case, causing debtors to emerge from bankruptcy protection in arrears on their mortgage payments. *Id.* Rule 3001(c)(3) was adopted in 2012 to make it easier for trustees and debtor's counsel to discover when a proof of claim filed asserted debt on which

While these developments are laudable, they are nevertheless limited in scope. They often address issues after hundreds of bankruptcy cases have been affected by wrongful behavior. Moreover, these efforts have not always stamped out the practices they seek to prevent.²⁷

Systematic noncompliance with bankruptcy law and procedure may upset the careful balance of rights that bankruptcy aims to achieve. Bankruptcy seeks the dual goals of granting a consumer debtor a fresh financial start and providing for the fair and ratable distribution of assets to creditors.²⁸ When bankruptcy participants²⁹ disregard bankruptcy law in the pursuit of individual gain, they undermine this balance.³⁰ Creditors that fail to follow bankruptcy law and procedural rules might overdraw from the debtor's common pool of assets, affecting distributions to complying creditors. Creditor overreaching can also impair the debtor's pursuit of a fresh start.³¹

the statute of limitations has run. FED. R. BANKR. P. 3001(c)(3). Rule 3001(c)(3) requires the holder of a claim based on an open-end or revolving consumer credit agreement to include in the proof of claim certain information that allows parties in interest to determine its timeliness. *Id.*

²⁷ See, e.g., Bruce, *Debtor Class*, *supra* note 3, at 35–36 (collecting “[e]arly evidence . . . that mortgage servicers have failed to comply with the terms of [a major] mortgage servicing settlement. . . . [and] some creditors may decide to ignore the new requirements of Rules 3002 and 3002.1 in light of the costs associated with compliance”) (footnote omitted); *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).

²⁸ Bruce, *Debtor Class*, *supra* note 3, at 31.

²⁹ Creditors are not the only bankruptcy participants who might exploit bankruptcy's structure for individual gain. Some consumer debtors have abused the bankruptcy process by concealing assets, making false oaths, or engaging in opportunistic pre-bankruptcy planning. See, e.g., Raymond T. Nimmer, *Consumer Abuse of the Bankruptcy Process*, L. & CONTEMP. PROBS., Summer 1987, at 89, 90–92. In addition, non-lawyer bankruptcy petition preparers have been punished for the unauthorized practice of law, collecting fees higher than the legal limit set by the bankruptcy court, or engaging in other predatory practices. See U.S. TR. ANN. REP. *supra* note 24, at 15–16 (detailing misconduct by bankruptcy petition preparers). Debtors' attorneys can likewise violate bankruptcy law by counseling debtors to make misstatements or failing to provide promised services. Clifford J. White, Remarks at the American Bankruptcy Institute's Bankruptcy Battleground West (Mar. 11, 2016), available at https://www.justice.gov/ust/file/abi_bankruptcy_battleground_03112016.pdf/download (discussing the need to address unscrupulous and poor-performing bankruptcy attorneys). In recent years, some attorneys and petition preparers have been disciplined for their participation in fraudulent foreclosure rescue schemes. See U.S. TR. ANN. REP., *supra* note 24, at 17.

³⁰ See Bruce, *Debtor Class*, *supra* note 3, at 31.

³¹ See *id.*

B. Bankruptcy's Structural Vulnerabilities

The structure of the bankruptcy system permits the behavior highlighted in the prior Part. Although bankruptcy, by all accounts, has a robust set of enforcers, no one bankruptcy official is positioned to police against the routine, small-scale misconduct present in the bankruptcy process.

1. Bankruptcy Judges

Bankruptcy judges have broad authority to enforce the bankruptcy laws and police behavior in their own courtrooms. Section 105 of the Bankruptcy Code permits courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code.³² In addition, a majority of courts find that bankruptcy courts possess inherent judicial authority to issue contempt sanctions,³³ although courts differ on whether that inherent power extends to issuing both civil and criminal contempt orders.³⁴ Courts also have authority under Bankruptcy

³²11 U.S.C. § 105(a) (2012). Section 105 goes on to state, “No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” *Id.* § 105(b).

³³*Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009) (describing bankruptcy courts’ “inherent sanction authority”); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996) (“Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.”); *see also* *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) (noting that bankruptcy courts “may also possess ‘inherent power . . . to sanction ‘abusive litigation practices.’” (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375–76 (2007))); *id.* at 1198 (“The court may also possess further sanctioning authority under either § 105(a) or its inherent powers.”). *But see* *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 913 (7th Cir. 2011) (drawing distinction between Article III courts and legislative courts, and questioning whether legislative courts have any powers beyond those granted by statute).

³⁴*Cox v. Zale Del., Inc.*, 239 F.3d 910, 916–17 (7th Cir. 2001) (“[I]t is unsettled whether bankruptcy judges have criminal-contempt powers.”); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 & n.3 (5th Cir. 1997) (“Bankruptcy courts lack the power to hold persons in criminal contempt.”); *Griffith v. Oles (In re Hipp, Inc.)*, 895 F.2d 1503, 1515–16 (5th Cir. 1990) (no criminal contempt power under § 105); *In re Lawrence*, 164 B.R. 73, 74–75 (W.D. Mich. 1993) (following *Hipp*). *But cf.* *Brown v. Ramsay (In re Ragar)*, 3 F.3d 1174, 1179 (8th Cir. 1993) (“With all respect, we think [*Hipp*] is simply wrong.”). At least one court has found that it is unconstitutional for Article I bankruptcy courts to issue civil contempt sanctions, finding it more appropriate to certify the question to the district court. *Tele-Wire Supply Corp. v. Presidential Fin. Corp., Inc. (In re Industrial Tool Distribs., Inc.)*, 55 B.R. 746, 752 (N.D. Ga. 1985); *see also* *Laura B. Bartell, Contempt of the Bankruptcy*

Rule 9011, a corollary of Rule 11 of the Federal Rules of Civil Procedure, to impose sanctions on parties who sign documents that violate Rule 11's requirements.³⁵

Bankruptcy courts have played a central role in addressing misbehavior in the consumer bankruptcy process.³⁶ Indeed, in the wake of the Great Recession, much of the mortgage lending and servicing problems that came to light did so in the context of bankruptcy cases.³⁷ But although bankruptcy judges have *sua sponte* moved to fill many enforcement gaps, they are not designed to investigate and correct widespread bankruptcy misbehavior.³⁸

Bankruptcy courts, like all courts, serve a dispute-resolution function. Indeed, a major goal of the Bankruptcy Reform Act of 1978 was to separate the functions of the former bankruptcy referees so that the judicial functions of a bankruptcy case would be handled by a bankruptcy judge, while the administrative functions would be managed by the United States Trustee.³⁹

Court—A New Look, 1996 U. ILL. L. REV. 1, 3 (1996) (arguing that bankruptcy courts have “no independent contempt power”).

³⁵Rule 11 provides the following:

By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11. Rule 9011 has provided courts a strong basis to challenge filing misconduct by mortgage servicers in the heat of the subprime lending and foreclosure crisis. *See* Porter, *supra* note 11, at 171, 172.

³⁶Porter, *supra* note 11, at 134, 138; Wells, *supra* note 12, at 484 (“[B]ankruptcy courts increasingly have taken on an activist role, *sua sponte* asking questions, raising challenges and issuing sanctions to lenders and their counsel in order to protect debtors and the bankruptcy process.”).

³⁷Porter, *supra* note 11, at 134.

³⁸*See* Wells, *supra* note 12, at 484; *see also* Countrywide Homes Loans, Inc. v. McDermott, 426 B.R. 267, 281 (N.D. Ohio 2010).

³⁹Richard Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 966–67 (1993).

Although the bankruptcy judge's role still retains substantial administrative characteristics,⁴⁰ bankruptcy courts lack investigatory bodies 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."⁴¹ These structural factors relegate bankruptcy judges to a supporting role in policing creditor behavior.

In addition, courts' attempts to fashion comprehensive relief to address widespread misconduct have faced challenges on appeal. In *Countrywide Home Loans, Inc. v. McDermott*, for example, the bankruptcy court attempted to address alleged "bad faith and abusive practices in connection with [Countrywide Home Loans'] preparation, verification, filing, and prosecution of pleadings and proofs of claim in bankruptcy cases[.]"⁴² In the case before the court, Countrywide had filed a proof of claim and opposed confirmation of the debtor's plan, even though Countrywide no longer had any interest in the debtor's property.⁴³ The court, taking judicial notice of past experience with this servicer, law review articles addressing problems with mortgage servicers generally, and other examples of Countrywide's misconduct in bankruptcy cases, ordered Countrywide to accompany each proof of claim it filed in the district with a supplemental worksheet that clarified various details of the claim.⁴⁴ On appeal, the district court reversed the sanction order, finding it was not supported by the factual record in the individual case before the court.⁴⁵

Similarly, in *In re Stewart*, the Fifth Circuit held that the bankruptcy court had "exceed[ed] [its] statutory authority" by requiring Wells Fargo to audit all of its proofs of claim filed in the district.⁴⁶ The bankruptcy court had found numerous errors in a proof of claim filed by Wells Fargo, resulting in the lender claiming more than \$10,000 above what the debtor actually owed.⁴⁷ The bankruptcy court incorporated by reference similar findings from other bankruptcy cases to conclude that "Wells Fargo's mortgage claims exhibit systematic errors arising from its highly

⁴⁰ See *id.* at 968–70.

⁴¹ *Id.* at 982.

⁴² 426 B.R. at 272.

⁴³ *Id.* at 270.

⁴⁴ *Id.* at 271–72.

⁴⁵ *Id.* at 281.

⁴⁶ 647 F.3d 553, 556 (5th Cir. 2011).

⁴⁷ *Id.* at 555.

automated, computerized loan-administration system.”⁴⁸ The court ordered Wells Fargo to audit every proof of claim filed in the district, provide a complete loan history of every account, and amend proofs of claim already on file to address these issues.⁴⁹ Although the district court affirmed the ruling, the Fifth Circuit reversed, holding that the injunction reached impermissibly beyond the boundaries of the debtor’s individual case, and the court lacked jurisdiction to order it.⁵⁰

These cases illustrate the potential limits on bankruptcy courts’ powers to fashion remedies that address widespread misconduct. Although courts can sanction misbehavior in an individual case before them, and, as discussed below, exercise jurisdiction over a class of debtors, they may be unable to effectively address harms that reach beyond the cases or proceedings at bar.⁵¹

2. The United States Trustee Program

The United States Trustee (UST) Program, a division of the Department of Justice, oversees the administration of the bankruptcy system and serves as a “watchdog” for bankruptcy-related misconduct.⁵² In addition to its administrative oversight of the bankruptcy process,⁵³ the UST has both civil and criminal enforcement powers.⁵⁴ For example, in cases of a debtor’s fraud and abuse, the UST can move to dismiss⁵⁵ or convert a case or object to the debtor’s discharge.⁵⁶ When a party’s behavior in bankruptcy rises to

⁴⁸ *Id.* at 555–56.

⁴⁹ *Id.* at 556.

⁵⁰ *Id.* at 558.

⁵¹ *See id.* at 556, 558; *Countrywide Home Loans, Inc. v. McDermott*, 426 B.R. 267, 281 (N.D. Ohio 2010).

⁵² MARK I. BANE ET AL., *COLLIER ON BANKRUPTCY* ¶ 6.01[2] (Matthew Bender ed., 16th ed. 2017) (describing the role of the UST). In North Carolina and Alabama, Bankruptcy Administrators, a division of the courts, fill a similar function. *See* Rafael Pardo & Katherine Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 *UCLA L. REV.* 384, 395–97 (2012).

⁵³ *See* 28 U.S.C. § 586(a)(3) (2012) (delineating the administrative duties of the UST).

⁵⁴ *See* H.R. REP. NO. 95-595, at 101 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6070–71 (The UST “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.”).

⁵⁵ 11 U.S.C. § 707(a), (b)(1) (2012) (grounds for dismissal).

⁵⁶ 11 U.S.C. § 727(c)(1) (2012) (denial of discharge).

the level of a bankruptcy crime, the UST has both discretionary and mandatory authority to refer the activity to the U.S. Attorney,⁵⁷ and might assist the prosecution.⁵⁸

The UST Program serves as an important bulwark against misuse of the bankruptcy laws. Yet the bankruptcy system does not contemplate that the UST will be heavily involved in the day-to-day operation of an individual consumer's bankruptcy case.⁵⁹ On the contrary, this day-to-day administration and policing of consumer bankruptcy cases is tasked to Chapter 7 or Chapter 13 trustees, who operate, in most jurisdictions, under the supervision of the UST Program.⁶⁰ This leaves the UST to focus on "cases involving substantial sums of money [or] particularly egregious behavior."⁶¹

Such targeted enforcement must, of necessity, be selective. And over time, the priorities of the UST program have drawn criticism. For example, early statistical evidence of the UST program found that enforcement against debtors for various bankruptcy crimes (concealment of assets, false oaths, and bribery) occurred far more frequently in smaller districts than in larger districts, giving rise to an imbalance in the application of law.⁶² In addition, in the initial years following the foreclosure crisis, some criticized the UST program for focusing its enforcement efforts too heavily on consumer debtors, rather than policing the activities of creditors.⁶³

⁵⁷ 28 U.S.C. § 586(a)(3)(F), (f)(2)(B)(i) (2012).

⁵⁸ Mary Jo. Heston, *The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions*, 6 AM. BANKR. INST. L. REV. 359, 398–406 (1998) (describing the UST's role in the prosecution of bankruptcy crimes).

⁵⁹ See, e.g., Tamara Ogier & Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317, 347–48 (1998).

⁶⁰ In North Carolina and Alabama, where the UST Program does not operate, chapter 7 and 13 trustees are appointed and monitored by the court. W. HOMER DRAKE, JR. ET AL., CHAPTER 13 PRACTICE AND PROCEDURE § 17:5, Westlaw (database updated June 2017).

⁶¹ Ogier & Williams, *supra* note 59, at 348; see also Bruce, *Debtor Class*, *supra* note 3, at 39; *Policing Lenders and Protecting Homeowners: Is Misconduct in Bankruptcy Fueling the Foreclosure Crisis?: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 110th Cong. 174 (2008) (statement of Clifford J. White III, Director, Exec. Office for U.S. Tr., U.S. Dep't of Justice) (noting that UST attention is best focused on cases "in which the integrity of the bankruptcy system as a whole is at stake" and that creditor abuses in many cases are best addressed by case trustee or debtors' lawyers).

⁶² Ogier & Williams, *supra* note 59, at 348.

⁶³ See *United States Trustee Program: "Watch Dog or Attack Dog?": Hearing Before the Subcomm. on Admin. and Commercial Law & H. Comm. on the Judiciary*, 110th Cong. 17–20 (2007) (statement of A. Jay. Cristol, Chief Justice Emeritus, U.S. Bankr. Court of Fla.) (arguing

3. Chapter 7 and 13 Trustees

In every chapter 7 and 13 bankruptcy case, a trustee is assigned to administer the estate of a debtor.⁶⁴ In chapter 7 cases, the trustee typically oversees the liquidation of any non-exempt assets and distribution of proceeds to creditors.⁶⁵ In chapter 13 cases, trustees collect debtors' payments under a plan and distribute them to creditors.⁶⁶

Chapter 7 and 13 trustees have a range of duties that involve detailed monitoring of an individual debtor's case.⁶⁷ As such, they are theoretically well-positioned to discover deviations from bankruptcy law and procedure in an individual debtor's bankruptcy case. Yet trustees typically carry enormous caseloads, and often lack the time to scrutinize proofs of claim and other bankruptcy filings for errors, omissions, or overreaching.⁶⁸ In one

that the UST program places too many resources on consumer debtor abuse); *id.* at 93 (testimony of Mary Powers, Esq.) (arguing that the UST leadership is inappropriately concerned with generating statistics of debtor abuse); *id.* at 104-05 (testimony of Paul M. Uyehara, Esq.) (articulating several criticisms of the UST enforcement efforts). When people believe that the laws are enforced unfairly, that belief can have deep expressive costs on the system. *See* Gregory M. Gilchrist, *The Special Problems of Banks and Crime*, 85 U. COLO. L. REV. 1, 20-21 (2014) (discussing the expressive cost of unbalanced enforcement of banking regulations).

⁶⁴ *See* 2 R. GINSBERG & R. MARTIN ON BANKRUPTCY § 15.03 [B] (Supp. 1997).

⁶⁵ *Id.* § 15.03 [B], [C].

⁶⁶ *Id.* § 15.03 [B].

⁶⁷ *See, e.g.*, 11 U.S.C. § 704(a) (2012) (providing that the chapter 7 trustee shall, among other things: "collect and reduce to money the property of the estate for which such trustee serves"; "ensure that the debtor shall perform his intention as specified in § 521(a)(2)(B) of [the Bankruptcy Code]"; "investigate the financial affairs of the debtor"; "if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper"; and "if advisable, oppose the discharge of the debtor"); *id.* § 1302 (providing that the chapter 13 trustee shall perform several of the duties specified above, plus undertake additional duties appropriate for chapter 13 cases); BANKRUPTCY LAW MANUAL § 4:7 (5th ed. 2017) ("It is the sole responsibility of the trustee to . . . administer estate assets, subject to supervision by the U.S. Trustee and pursuant to the Bankruptcy Code and Rules.").

⁶⁸ *See, e.g.*, Einoder v. Mount Greenwood Bank (*In re Einoder*), 55 B.R. 319, 323 (Bankr. N.D. Ill. 1985) (noting that two chapter 13 trustees in a district divided roughly 18,000 cases). These caseloads have recently gotten heavier, as new requirements from the Bankruptcy Abuse Prevention and Consumer Protection Act have increased the time and effort necessary to administer an individual case. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 29-33 (2008), available at <http://www.gao.gov/new.items/d08697.pdf> ("The [Bankruptcy Abuse Prevention and Consumer Protection Act] has affected the responsibilities of chapter 7 and chapter 13 private trustees, largely as a result of new documentation, verification, and reporting requirements. The trustees

case involving the widespread practice of filing proofs of claim for which the statute of limitations had run, a judge in the Northern District of Illinois remarked as follows:

In districts like this with a large number of chapter 13 cases . . . trustees typically object to claims only if they are filed after the claims bar date or improperly seek priority treatment, i.e., the easiest-to-detect bases for disallowance. Chapter 13 trustees in this district do not object to proofs of claim based on statute of limitations defenses. This is not surprising because objecting to claims based on affirmative defenses would require trustees to examine the details of virtually every unsecured proof of claim, which is simply impracticable.⁶⁹

In addition to the enormous caseloads many private trustees carry, trustees also face economic barriers to robustly policing the bankruptcy process. “Chapter 7 panel trustees receive \$60 of each filing fee paid by the debtor, plus a sliding-scale commission of the amounts they disburse from the bankruptcy estate.”⁷⁰ As such, a trustee’s efforts must result in a dividend to creditors before the trustee can be paid any additional sums, which essentially places any activities they pursue on a contingency-fee basis.⁷¹ Chapter 13 trustees typically receive a percentage of the monthly disbursements made under a chapter 13 plan, but this fee must pay the trustee’s salary and approved expenses.⁷² Thus, the chapter 13 trustee must be sensitive to the accrual of litigation costs.⁷³ In light of these realities, private trustees may have difficulty challenging lenders’ actions where the legal issues are unsettled, the discovery is complicated, the ultimate recovery is small, or a combination of these factors is present.⁷⁴

with whom we spoke said the act significantly increased the amount of staff time needed to administer a bankruptcy case.”)

⁶⁹Edwards v. LVNV Funding, LLC (*In re Edwards*), 539 B.R. 360, 365 (Bankr. N.D. Ill. 2015) (footnote omitted).

⁷⁰Bruce, *Debtor Class*, *supra* note 3, at 38 (citation omitted).

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴Trustees have, on a few occasions, attempted to use the class action device to save on litigation costs when addressing systemic bankruptcy issues. *See, e.g.*, Chiang v. Neilson (*In re Death Row Records, Inc.*), No. 06-11205, 2012 WL 952292, at *12–13 (B.A.P. 9th Cir. Mar. 21, 2012) (denying motion to dismiss chapter 7 trustee’s class action complaint); Harker v.

C. Private Litigants' Attempts to Fill the Gap

The prior parts have identified and explained the source of a regulatory gap in consumer bankruptcy cases. Put simply, while the consumer bankruptcy process features several layers of oversight, neither the bankruptcy court, the U.S. Trustee, nor Chapter 7 or 13 trustees are ideally positioned to address small-scale wrongdoing on a comprehensive basis. As such, overreaching and improper behavior can slip through the cracks, undermining bankruptcy's aims. This section outlines several key efforts by private litigants—debtor's attorneys and sometimes private trustees—to close this enforcement gap.

In some cases, litigants have used bankruptcy's existing remedial structure to address wrongful behavior. For example, the Bankruptcy Code provides that a creditor who violates the automatic stay may be liable for both actual and punitive damages.⁷⁵ Likewise, some violations of the Bankruptcy Rules, such as the recently enacted Rule 3002.1, can give rise to sanctions if a creditor fails to comply.⁷⁶

Under § 362(k), one court recently awarded \$1,074,581.50 in actual damages and \$45 million in punitive damages against Bank of America for its egregious violations of the automatic stay in a consumer bankruptcy case.⁷⁷ The court found that Bank of America had driven its customers through a “kafkaesque nightmare” of dual tracking, harassing and threatening behavior, and, once they filed for bankruptcy protection, repeated violations of the automatic stay.⁷⁸ All the while, the plaintiffs lost income and property and suffered extreme emotional distress.⁷⁹ Another court, at the request of the case trustee, sanctioned PHH Mortgage Corporation \$300,000 under Bankruptcy Rule 3002.1 and its inherent powers, based on the servicer's practices of misapplying debtors' plan payments and failing to send proper notice of the post-petition fees and expenses in several debtors' bankruptcy cases.⁸⁰

Countrywide Homes, Inc. (*In re Johnson*), No. 08-31253, 2010 WL 3908978, at *2, *6 (S.D. Ohio Sept. 20, 2010) (affirming dismissal of chapter 13 trustee's class action complaint).

⁷⁵ 11 U.S.C. § 362(k)(1) (2012).

⁷⁶ FED. R. BANKR. P. 3002.1(h)(i).

⁷⁷ *Sundquist v. Bank of Am.*, 566 B.R. 563, 620 (Bankr. E.D. Cal. 2017).

⁷⁸ *Id.* at 571.

⁷⁹ *Id.*

⁸⁰ *In re Gravel*, 556 B.R. 561, 579–81 (Bankr. D. Vt. 2016).

Other litigants have looked beyond the Bankruptcy Code, vindicating their rights through federal or state consumer protection law.⁸¹ Non-bankruptcy causes of action can be particularly useful in cases in which the Bankruptcy Code does not provide a private right of action to recover damages. For example, until recently, many debtors' attorneys filed FDCPA actions to challenge debt collectors' practices of filing proofs of claim for debt on which the statute of limitations has run.⁸² Because bankruptcy's remedial system did not provide a clear means to address this use of the claims process, attorneys argued that that practice was "false," "deceptive," "misleading," "unfair" or "unconscionable" under FDCPA.⁸³ In *Midland Funding v. Johnson*, decided in May 2017, the Supreme Court largely put an end to that practice by holding that a proof of claim that asserts a stale debt does not violate the FDCPA.⁸⁴ Yet the Court stopped short of holding that the FDCPA had no application in bankruptcy, a question on which it had granted *certiorari*.⁸⁵

Some debtors' attorneys and private trustees have attempted to overcome the financial barriers to challenging bankruptcy misconduct by launching class action adversary proceedings within a debtor's bankruptcy case.⁸⁶ Debtor class actions are a relatively obscure procedural phenomenon in the bankruptcy courts, but they appear to be gaining traction. In these cases, a class of debtors commences an adversary proceeding against a common lender, seeking injunctive relief or damages for the lender's alleged violations of bankruptcy law or non-bankruptcy statutes.⁸⁷

⁸¹ See, e.g., *In re Laskowski*, 384 B.R. 518 (Bankr. N.D. Ind. 2008) (suit under the Real Estate Settlement Procedures Act to address alleged bankruptcy-related harms); *In re Payne*, 387 B.R. 614 (Bankr. D. Kan. 2008) (same); *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (FDCPA suit to address the filing of time-barred proofs of claim); see also Symposium, *Consumer Bankruptcy Panel, Recent Developments in Bankruptcy Regulation: Mortgage Servicing Rules, the FDCPA, and the CFPB*, 32 EMORY BANKR. DEV. J. 303, 308, 319 (2016); c.f. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1415–16 (2017) (holding filing time-barred proofs of claim, without more, does not violate the FDCPA); *In re Torres*, 367 B.R. 478, 481 (Bankr. S.D.N.Y. 2007) (holding that bankruptcy court lacked jurisdiction to resolve Fair Credit Reporting Act claims based on violations of the discharge injunction).

⁸² See Bruce, *Debt Buyers Beware*, *supra* note 3, at 1, 4 (discussing this line of cases).

⁸³ See *id.* at 2 (discussing both the case law on this issue and the limitations of bankruptcy's remedies to address it).

⁸⁴ 137 S. Ct. at 1415–16.

⁸⁵ See *id.* at 1419–20 (Sotomayor, J., dissenting).

⁸⁶ See Bruce, *Debtor Class*, *supra* note 3, at 40 (discussing this phenomenon).

⁸⁷ See *id.*

Over the last several years, debtor class actions have been launched to combat many of the practices discussed above,⁸⁸ as well as others not highlighted in this essay.⁸⁹ Indeed, at the time of this writing, it appears that debtor class actions could emerge as the next front for combating the practice of filing time-barred debt claims, now that the Supreme Court has removed the availability of FDCPA suits for this practice. Indeed, the Bankruptcy Court for the Southern District of Texas recently denied a motion to dismiss a nationwide debtor class action asserting that Atlas Acquisition abused the bankruptcy system by intentionally disregarding the rules for filing claims.⁹⁰ The court held that it had subject matter jurisdiction over a nationwide class of debtors.⁹¹ It deferred questions of class certification for a later hearing.⁹²

Taken together, these cases represent a movement to use private lawsuits as a tool to encourage greater levels of compliance with consumer bankruptcy law and procedure. Many statutory regimes in the United States expressly rely on private litigants to serve either a primary or a supporting regulatory role.⁹³ Yet the regulatory function served by private litigants is often eclipsed by concerns of private enforcement's pathologies.⁹⁴ As a result, private lawsuits have faced restriction on a number of fronts, including popular calls for "tort reform," limitations on class actions, and other procedural changes that make it more difficult to commence a

⁸⁸ See *Belton v. GE Capital Consumer Lending, Inc. (In re Belton)*, No. 12-23037 (RDD), 2014 WL 5819586, at *1 (Bankr. S.D.N.Y. Nov. 10, 2014) (class action challenging the practice of preserving discharged debt on borrowers' credit reports), *rev'd*, No. 15 CV 1934 VB, 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015); *Credit One Fin. v. Anderson (In re Anderson)*, 553 B.R. 221, 228 (S.D.N.Y. 2016) (same); Order Denying Atlas Acquisition LLC & Avi Schild's Motion to Dismiss Plaintiff's Class Certification Claims at 1–2, *Jones v. Atlas Acquisition LLC (In re Jones)*, No. 16-03235, (Bankr. S.D. Tex. May 19, 2017) [hereinafter *In re Jones Order*] (debtor class action based on the practice of filing time-barred debt claims).

⁸⁹ See Bruce, *Debtor Class*, *supra* note 3, at 21 (discussing many such cases).

⁹⁰ *In re Jones Order*, *supra* note 88, at 2, 13, 19. The United States Trustee Program has pursued similar claims in pending litigation. See Clifford J. White III, Dir. of the U. S. Tr. Program, Address to the 52nd Annual Seminar of the National Association of Chapter 13 Trustees, at 2–3 (July 13, 2017) (transcript available at <https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees>).

⁹¹ *In re Jones Order*, *supra* note 88, at 19.

⁹² *Id.*

⁹³ See Glover, *supra* note 6, at 1153–60.

⁹⁴ *Id.* at 1153.

lawsuit.⁹⁵ In the bankruptcy context, any embrace of private litigation that is not expressly sanctioned by the Bankruptcy Code or procedural rules has raised a number of complicated jurisdictional and interpretive questions.⁹⁶ These issues, combined with aggressive opposition by members of the consumer credit industry,⁹⁷ render most pursuits of private litigation in consumer bankruptcy cases an uphill battle.

In light of these threats to the use of private litigation, both within bankruptcy and without, it is important to ground the efforts in the trenches of consumer bankruptcy cases in the vast literature that explores the role private litigants should play in our regulatory system. The following section takes on that task. It first provides a brief explanation of the function of litigation as a regulatory tool. It then considers whether private enforcers can be effective supplementary regulators in the consumer bankruptcy context.

III. PRIVATE ENFORCEMENT OF THE BANKRUPTCY LAWS

A. *Private Enforcement Plays a Purposeful Role in the U.S. Regulatory Regime*

The legal system in the United States relies heavily on enforcement as a regulatory tool.⁹⁸ Rather than limiting *ex ante* which products or services may come to market, as is common in other areas of the world,⁹⁹ the U.S. regulates largely by “imposing consequences on those who violate

⁹⁵ *Id.* at 1161–75.

⁹⁶ See, e.g., Bruce, *Debtor Class*, *supra* note 3, at 73–74 (discussing jurisdictional challenges to debtor class actions); Bruce, *Vindicating*, *supra* note 3, at 451, 453, 462–63 (discussing other challenges to debtor class actions); Bruce, *Debt Buyers Beware*, *supra* note 3, at 1–2, 11 (considering the extent to which federal non-bankruptcy claims can be asserted for bankruptcy-related harms).

⁹⁷ For example, when the *Midland Funding* case was appealed to the Supreme Court, amicus briefs supporting *Midland Funding* were filed by the Chamber of Commerce of the United States of America, Resurgent Capital Services, the National Creditors Bar Association, joined by several state creditors’ bar associations, ACA International, and DBA International, Inc. 137 S. Ct. 1407 (No. 16-348).

⁹⁸ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2nd prtg. 2003).

⁹⁹ Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377–78 (2007) [hereinafter Issacharoff, *Regulating After the Fact*] (comparing the U.S. model with the *ex ante* regulatory models “prevalent in much of Europe and . . . the rest of the world”).

substantive law after the resulting harms have occurred.”¹⁰⁰ Private individuals serve a central role in the civil enforcement regime by bringing individual or collective lawsuits to address harms that have occurred.¹⁰¹ The threat of litigation is thought to encourage compliance with the law *ex ante* by “forc[ing] future actors to discount the cost of enforcement into their primary decisions on risk and precaution.”¹⁰² It relies “on the idea that parties should be able to internalize the risk of liability . . . and regulate themselves accordingly.”¹⁰³

Some scholars attribute the emphasis on enforcement through litigation to “the American method of providing activist government without a centralized bureaucracy.”¹⁰⁴ For example, one leading scholar suggests that the litigation-based structures respond to a “fundamental tension” in the U.S. political culture: On one hand, citizens “demand[] comprehensive governmental protection[]” necessitating an activist government, yet on the other, we “mistrust[] . . . [concentrated] power.”¹⁰⁵ Another suggests that ideological conflict between the executive and legislative branches causes Congress to task private attorneys, rather than executive agencies, with primary enforcement authority.¹⁰⁶ Still other scholars suggest the

¹⁰⁰ Glover, *supra* note 6, at 1145. See also Issacharoff, *Regulating After the Fact*, *supra* note 99, at 377 (“What really sets the United States apart is the fact that its basic regulatory model is ex post rather than ex ante.”). The federal securities laws provide a prime example of this ex-post model of enforcement. The Securities and Exchange Commission (SEC) places relatively few legal impediments on the issuance of securities, instead punishing behavior that violates the securities laws after it has occurred. See KAGAN, *supra* note 98, at 194–95; Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. REG. 149, 156 (1990). A notable exception to this is the Food and Drug Administration (FDA)’s regulation of pharmaceuticals, which places significant *ex ante* requirements on the testing, manufacturing, labeling, and advertising of drugs. See Glover, *supra* note 6, at 1199.

¹⁰¹ See Glover, *supra* note 6, at 1199; FABRIZIO CAFAGGI & HANS-W. MICKLITZ, NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 12 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009); KAGAN, *supra* note 98, at 16 (“[I]n the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states.”).

¹⁰² SAMUEL ISSACHAROFF & IAN SAMUEL, *The Institutional Dimension of Consumer Protection*, in NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 49 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009).

¹⁰³ Issacharoff, *Regulating After the Fact*, *supra* note 99, at 379–80.

¹⁰⁴ Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L. Q. 901, 907 (2002).

¹⁰⁵ KAGAN, *supra* note 98, at 35.

¹⁰⁶ SEAN FARHANG, THE LITIGATION STATE 60 (2010).

motivations are more practical, relating to the capacity of federal or state authorities to handle the work on their own.¹⁰⁷

Whatever the justification, the emphasis on private litigation to enforce the law is no accident. It is a purposeful and important component of the American regulatory regime.¹⁰⁸ Moreover, it is a mechanism to which Congress repeatedly returns as it crafts new laws.¹⁰⁹ Congress has made the decision to task private parties as regulators in a wide variety of statutes, ranging from consumer product safety to securities regulation, consumer lending, and labor and employment.¹¹⁰

Private enforcers can be tasked as primary regulators in cases in which public regulators cannot be effective, whether because of inadequate resources or informational disadvantages.¹¹¹ In other cases, private enforcers can supplement public enforcement efforts. The Supreme Court recently stressed that Congress purposefully overlays complementary enforcement structures as part of a broader regulatory scheme.¹¹² In *Pom Wonderful LLC v. Coca-Cola Co.*, the Court permitted competitors to bring claims under the Lanham Act for misleading juice labeling, despite the comprehensive regulation of juice labeling under the Food, Drug, and Cosmetic Act (FDCA).¹¹³ In so holding, the Court explained that the Food and Drug Administration, which enforces the FDCA, “does not have the same perspective or expertise in assessing market dynamics that day-to-day

¹⁰⁷ See, e.g., Mary Frances Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS. U. L. J. 441, 441–51 (1977) (arguing that entrusting private litigants with policing employment discrimination arose from Congress's belief that the federal government would not have the capacity to handle all of the cases). Other explanations have been advanced. See, e.g., Glover, *supra* note 6, 1151–52 (2012) (arguing legislators rely on public litigation to reap the expressive benefits of reforms, yet avoid the costs enforcing them); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2002) (arguing Congress might delegate to courts because “judges . . . are subject to strong institutional norms that render judicial interpretation more stable and consistent over time than interpretation by successive political administrations . . .”); see also Glover, *supra* note 6, 1151–52 (collecting authority).

¹⁰⁸ See Glover, *supra* note 6, at 1146.

¹⁰⁹ See *id.* at 1145.

¹¹⁰ See *id.* at 1158–59 (collecting examples).

¹¹¹ *Id.* at 1153–54.

¹¹² See *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

¹¹³ *Id.* at 2229.

competitors possess.”¹¹⁴ As such, Lanham Act suits provide an additional check on manufacturers’ conduct.¹¹⁵ The Court further noted that allowing both the FDCA and the Lanham Act to regulate this area “takes advantage of synergies among multiple methods of regulation” and “is quite consistent with congressional design”¹¹⁶

B. *The Benefits and Drawbacks to Private Enforcement*

Private, enforcement-based models of regulation are seen by many scholars to provide significant benefits over alternative regulatory structures. First, *ex post* models of regulation (whether administered by public or private actors) are believed to be less expensive, more agile, and more supportive of innovation than the “command and control” models popular in other countries.¹¹⁷ It is self-evident that public enforcers—agencies, governmental entities, and the like—face exhaustible resources. As such, they must be selective in which harms they choose for prosecution.¹¹⁸ Private enforcement shifts enforcement costs from governmental budgets onto private parties, potentially increasing the number of enforcement actions that can occur.¹¹⁹ Private enforcement mechanisms also can adapt to changing needs without the burdens of rulemaking or legislative change.

Second, public enforcers face informational disadvantages, as they frequently are less likely than the victims to know about potential violations of the law. Private enforcement eases these barriers by centralizing redress

¹¹⁴ *Id.* at 2238.

¹¹⁵ *See id.* at 2238–39.

¹¹⁶ *Id.* at 2231, 2239.

¹¹⁷ *See, e.g.,* ISSACHAROFF & SAMUEL, *supra* note 102, at 56 (“In many consumer contexts . . . the fluidity of demand requires that products be introduced and withdrawn quickly in response to market conditions. Requiring new products to undergo a necessarily dilatory process of regulatory prescreening threatens the vitality of markets and depresses the ability to meet consumer demand. In such circumstances, both producers and consumers may be better served by a system which permits liberal entry into the market and provides sufficient mechanisms of accountability”); Glover, *supra* note 6, at 1150 & n.47 (2012) (noting that *ex ante* regulations cannot anticipate all potential malfeasance).

¹¹⁸ *See* Glover, *supra* note 6, at 1150 & n.45 (collecting examples).

¹¹⁹ *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 663 (2013) (“[P]rivate enforcement litigation can actually enhance the efficient use of scarce bureaucratic resources by allowing administrators to focus enforcement efforts on violations that do not provide adequate incentives for private enforcement, while resting assured that those that do will be prosecuted by private litigants.”).

with those who have the best access to information about wrongdoing. As one scholar noted in the context of civil rights litigation, “[T]he massive governmental expenditures required to detect and investigate misconduct are no match for the millions of ‘eyes on the ground’ that bear witness to . . . violations.”¹²⁰ Private enforcement might also reduce the effect of capture by dominant interest groups,¹²¹ encourage innovation of legal principles and policies, and “facilitate participatory and democratic governance.”¹²² Moreover, even in contexts with effective public enforcement structures, private enforcement can provide a useful supplement.¹²³

Private enforcement has no shortage of critics. The literature critical of litigation-based enforcement structures highlights the expense and inefficiencies of private enforcement, as well as its vulnerability to abuse.¹²⁴ A common concern is that private enforcers, motivated by individual profit, will bring suit irrespective of the social cost imposed on the defendants, the court system, and other parties.¹²⁵ Private litigants might even exploit the

¹²⁰Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1413 (2000).

¹²¹See, e.g., Simeon Djankov et al., *The Regulation of Entry*, 117 Q. J. ECON. 1, 35 (2002) (arguing, based on a study of market entry regulations in 85 countries, that heavier *ex ante* regulation is “associated with greater corruption and a larger unofficial economy, but not with better quality of private or public goods”); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 139–42 (1999) [hereinafter Issacharoff, *Group Litigation of Consumer Claims*] (addressing the political dependence and capture risk of governmental and non-governmental enforcers); Pitt & Shapiro, *supra* note 100, at 156 (noting the SEC has relied on ad hoc enforcement in certain contexts “in large measure because of the agency’s institutional fear that any specific regulations . . . could prove underinclusive or susceptible of easy evasion”).

¹²²Burbank et al., *supra* note 119, at 662.

¹²³See Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, L. & CONTEMP. PROBS., Spring/Summer 2001, at 137, 137 (discussing how private litigation can help supplement regulation of agencies that are underfunded, susceptible to capture, or politically constrained); Issacharoff, *Group Litigation of Consumer Claims*, *supra* note 121, at 136 (considering the inherent limitations of oversight by governmental and non-governmental organizations, “their effectiveness may be complemented by enlisting capable private enforcement”).

¹²⁴See, e.g., David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1925–28 (2014) (collecting criticism of, *inter alia*, private enforcements’ propensity for “piggyback lawsuits” and abusive litigation tactics).

¹²⁵Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997).

system, engaging in abusive discovery to extract settlements from defendants.¹²⁶

Critics also express concern that private litigation's decentralized nature drives the development of the law in socially undesirable directions.¹²⁷ Over time, litigants tend to push into the interstices of the law, and along the way, judicial decision-making generates "fragmented and incoherent" policy.¹²⁸ Critics have also observed that judicial decision-making could weaken public lawmaking on the same topics.¹²⁹ Furthermore, private litigation is feared to make defendants more adversarial and less cooperative with public regulatory agencies, thereby undermining the benefits of negotiation and compromise between regulator and regulated.¹³⁰ Finally, in regimes that feature overlapping public and private enforcement structures, scholars and commenters have questioned whether the overlap results in overregulation.¹³¹

C. Exploring the Utility of Private Enforcement in Consumer Bankruptcy

Relying on private parties to fill the enforcement gaps left open by bankruptcy's regulatory system responds to the limited time and financial resources of bankruptcy's primary enforcers.¹³² It also places the litigation authority in the hands of those who have key information on potential misconduct—those who are involved in the day-to-day operation of the case. Finally, it is an agile solution that can quickly adapt to new forms of

¹²⁶ See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 631 (2013).

¹²⁷ See, e.g., *id.* (noting critique that private enforcers "may develop and press novel applications of legal mandates that public enforcers . . . would forgo").

¹²⁸ Burbank et al., *supra* note 119, at 668 ("Given the inevitable heterogeneity of policy preferences among judges, the multitude of judges authoring regulatory policy often work at cross-purposes, seeking to advance conflicting and even contradictory regulatory agendas."); Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 8–9 (1996).

¹²⁹ Burbank et al., *supra* note 119, at 668.

¹³⁰ KAGAN, *supra* note 98, at 196–97; Burbank et al., *supra* note 119, at 669 ("Given how adversarial the litigation process is, wide scope for private enforcement litigation will erode and disrupt efforts at cooperation, coordination, and negotiation between regulators and those they regulate.").

¹³¹ Glover, *supra* note 6, at 1158 & n.89.

¹³² See *supra* Part II.

misconduct that arise. Yet several potential challenges to the use of private litigation in consumer bankruptcy warrant further discussion.

1. Can Consumer Debtors Effectively Regulate?

Even scholars who promote the use of private litigation as regulatory tool tend to qualify their enthusiasm in the field of consumer finance and consumer protection.¹³³ A dominant concern is that consumers simply will not use these remedies with sufficient frequency to provide a meaningful deterrent effect.¹³⁴ First, consumers may not know that their legal rights have been violated, or that they are entitled to legal recourse.¹³⁵ Some violations of law, particularly consumer financial matters, are extremely technical¹³⁶ and hard for a layperson to discover.¹³⁷ Other violations, such as fair housing and fair lending, only come into focus with consideration of a large data set that reveals disparities in treatment.¹³⁸

Even if a consumer is aware that her rights have been violated, the damages available to that individual consumer are often too small to justify

¹³³ See, e.g., Glover, *supra* note 6, at 1181–83 (arguing that the landscape of consumer finance is one in which public regulators might have significant advantages); Issacharoff, *Group Litigation of Consumer Claims*, *supra* note 121, at 135 (“In mass society, individual consumers have an inherent inability to protect themselves effectively from the improper or fraudulent conduct of a distant and usually more financially powerful seller.”); William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WISC. L. REV. 1018, 1043 (1981) (“[P]rivate remedies play little role in achieving compliance [in consumer protection] . . .”).

¹³⁴ Whitford, *supra* note 133, at 1026 (“[C]onsumers . . . do not utilize private compensatory remedies with sufficient frequency to provide any meaningful incentive for compliance with the vast majority of consumer protection legislation.”); Florianne Silvestri, Comment, *A Borrower’s Equitable Relief Pursuant to the Consumer Financial Protection Bureau’s Federal Regulations*, 48 U. TOL. L. REV. 613, 638–39 (2017) (expressing concern that borrowers will be unable to address misconduct in the foreclosure process through federal litigation).

¹³⁵ Whitford, *supra* note 133, at 1026–27.

¹³⁶ Glover, *supra* note 6, at 1182 (noting that “credit card bills and financial statements are increasingly technical and difficult for the average consumer to understand.”).

¹³⁷ See *id.* at 1181 (noting, with respect to consumer finance’s disclosure-based regime, “[c]onsumers generally do not comprehend such disclosures, nor do they tend to operationalize such information in a way that might alter their decision-making processes as market participants or as potential regulators.”).

¹³⁸ *Id.* at 1182 (noting that determining whether lenders have violated fair lending “generally requires a broad-based understanding of their financial practices vis-à-vis a number of consumers.”).

the costs of litigating a matter.¹³⁹ These include not only direct costs (hiring an attorney and paying filing fees, for example), but also the time and effort it takes to locate an attorney, confirm that a legal claim exists, and commence suit.¹⁴⁰ 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. These financial barriers to private litigation can theoretically be addressed by the imposition of litigation incentives, such as statutory or punitive damages, fee-shifting rules, and damage multipliers.¹⁴¹ Informational barriers are more difficult to surmount.

In light of the difficulties consumers tend to face in commencing lawsuits, private enforcement and consumer bankruptcy might appear to be strange bedfellows. Yet there are significant distinctions between the bankruptcy process and ordinary civil litigation of consumer claims. These distinctions support the idea that consumer debtors might be well situated to vindicate their rights through private causes of action.

a. Debtor's Counsel

The first important distinction arises from the fact that the vast majority of debtors enter bankruptcy with legal representation.¹⁴² This fact is significant, because it dramatically alters the informational asymmetry that plagues consumers outside of bankruptcy. At least in theory, the debtor's counsel has the opportunity to discover when other participants in the bankruptcy process misbehave and the legal skills to address the problem. In addition, considering that many debtors' attorneys specialize in bankruptcy practice, these attorneys are also in a position to discover the types of behavior that only become apparent when examining a large number of cases.¹⁴³

At the same time, debtors' counsel face limitations on their practical ability to address misconduct in bankruptcy. First, although most debtors enter bankruptcy with counsel, a significant and perhaps growing number of

¹³⁹Whitford, *supra* note 133, at 1027.

¹⁴⁰*Id.*

¹⁴¹*See id.*

¹⁴²Pardo, *supra* note 1, at 1124 (noting that “from 2007 through 2012, the median and mean self-representation rates in Chapter 7 consumer cases nationwide were, respectively, 7.4% and 7.5%.”).

¹⁴³Glover, *supra* note 6, at 1162–63.

debtors attempt to go it alone.¹⁴⁴ These debtors typically fare quite poorly in the bankruptcy process overall, and likely would be ineffective proponents of private litigation.¹⁴⁵

Second, the fee structure for debtor's attorneys is designed to give access to the bankruptcy process at a very low out-of-pocket cost for debtors.¹⁴⁶ Consumer debtors' attorneys make a living based on economies of scale, and focus largely on the routine aspects of the job.¹⁴⁷ A flat fee for bankruptcy assistance often carves out adversary litigation, meaning that debtors would either need to come up with additional amounts to pay out of pocket for this assistance, represent themselves, or forego the claim.¹⁴⁸ The financial constraints faced by debtors who need representation for adversary proceedings may limit the pool of available counsel to low-quality attorneys.¹⁴⁹ Adequate incentive structures, such as a statutory damage award from which an attorney can claim a contingency fee, might mitigate these financial challenges, allowing a debtor and her attorney to provide an effective check on misbehavior in the bankruptcy process.

b. The Pendency of a Bankruptcy Case

The second major distinction arises from the fact that a debtor is in the midst of a bankruptcy case. This fact changes the dynamic between lender and borrower, simplifying the process for a debtor to bring a claim. Consider a debtor outside of bankruptcy who is subject to dunning phone calls that violate the FDCPA.¹⁵⁰ Assuming the debtor knows that the creditor's behavior violates the FDCPA and gives rise to a claim for damages, many debtors are unlikely to go through the hassle and expense of finding a lawyer, commencing a case, and prosecuting it through final judgment. A debtor is more likely to raise these issues, however, as an

¹⁴⁴ See Lupica, *supra* note 1, at 81–83, 81 nn.134 & 136–37 (2012).

¹⁴⁵ See, e.g., Pardo, *supra* note 1, at 1119–20, 1120 n.19 (discussing how pro se debtors fare poorly in discharge litigation).

¹⁴⁶ *Id.* at 1124 (noting that chapter 7 debtors must pay up front for legal services, which limits the amount attorneys can charge).

¹⁴⁷ See Bruce, *Debtor Class*, *supra* note 3, at 37.

¹⁴⁸ See Pardo, *supra* note 1, at 1126–27 (discussing carveouts of discharge litigation).

¹⁴⁹ *Id.* at 1127.

¹⁵⁰ 15 U.S.C. §§ 1692–1692p (2012).

affirmative defense or counterclaim if she is sued to collect the debt.¹⁵¹ A debtor in bankruptcy is in a similar position to the defendant in a debt collection action, in that she already finds herself in court and can raise whatever claims she has with comparatively less difficulty. Moreover, depending what affirmative claims she raises, she might be able to do so without incurring additional filing costs.

c. The Presence of the Chapter 7 or 13 Trustee

The private trustee provides the third distinction that increases the likelihood that bankruptcy claims can be vindicated through private litigation. The trustee has virtually none of the information barriers identified above: she is certainly knowledgeable about the consumer bankruptcy process and positioned to notice trends across a large number of cases.¹⁵² With adequate time and the financial incentives to pursue a claim, the trustee, working on behalf of the estate, might herself bring suit to address misconduct.¹⁵³ Trustees also can play an informal role in policing the bankruptcy process by communicating with a debtor or her counsel that a potential claim exists. In this way, the informational barriers affecting consumers are muted in bankruptcy.

Taken together, these three distinctions place debtors in bankruptcy in a more informed and more protected position than their non-bankruptcy counterparts. These factors provide some support for the idea that with adequate incentives, debtors might well shoulder some of the burden of bankruptcy enforcement.

It should be noted that these very same distinctions were raised by the Supreme Court in its recent decision in *Midland Funding, LLC v. Johnson*.¹⁵⁴ There, the Court held that debtors in bankruptcy were adequately protected by these very features of bankruptcy procedure and did not need the additional protections of the FDCPA to address stale debt claims.¹⁵⁵ This opinion did not address the practical realities of bankruptcy practice, which saddle debtors' attorneys and bankruptcy trustees with large

¹⁵¹ See, e.g., Mark Pettit, Jr., *Representing Consumer Defendants in Debt Collection Actions: The Disclosure Defense Game*, 59 TEX. L. REV. 255, 259 (1981) (noting that TILA violations are frequently alleged as affirmative defenses and counterclaims).

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ 137 S. Ct. 1407, 1409–10 (2017).

¹⁵⁵ *Id.* at 1415–16.

caseloads and provide limited avenues for addressing the practice of filing stale debt claims on a widespread basis. By failing to confront these issues, the Court misapprehended the impact of consumer bankruptcy's distinct procedural factors. Rather than indicating that the FDCPA has no role to play in consumer bankruptcy, these distinctions support the idea that the FDCPA and similar statutes would be a particularly effective complement to bankruptcy's regulatory structure.

2. Would Enhancing Private Enforcement of Consumer Bankruptcy Result in Costly Overregulation?

A dominant concern with the use of overlapping public and private enforcement regimes is the fear of over-enforcement. When private lawsuits follow on the coattails of public regulation, the outcome can be costly, inefficient, and potentially unfair.¹⁵⁶ Critics of private litigation have seized on both the existence of “coattail” or piggyback class action, as well as rival settlements between public parties and private regulators,¹⁵⁷ to highlight the waste and unfairness that can accompany regulatory regimes that rely on private litigation in addition to public enforcement. A related fear is that the expense of private litigation might actually undermine the goals of consumer protection, as those costs will be passed along to consumers.¹⁵⁸

Yet scholars are beginning to recognize the potential benefits in redundant public and private enforcement.¹⁵⁹ When implemented thoughtfully, overlapping enforcement regimes can increase the resources available for enforcement, diversify the information available, and reduce agency costs.¹⁶⁰ Even competition between private and public enforcement regimes might also have valuable regulatory effects. Adam Zimmerman points out that rivalry between public and private settlement funds give claimants more options, and the rates of opt-out might provide signals to courts and policymakers about the fairness of the settlement.¹⁶¹

¹⁵⁶ See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 285 (2016).

¹⁵⁷ Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381, 400–04 (2013) (discussing the costs of settlement rivalries).

¹⁵⁸ Burbank et al., *supra* note 119, at 710.

¹⁵⁹ Clopton, *supra* note 156, at 285–286, 306; Zimmerman, *supra* note 157, at 396.

¹⁶⁰ Clopton, *supra* note 156, at 306–08.

¹⁶¹ Zimmerman, *supra* note 157, at 382–83, 387.

Concerns of cost and efficiency must be confronted, especially considering the small margins on which the consumer finance industry functions and the risk that increased costs will ultimately be passed along to consumers. Yet context is important. First, non-compliance with the law imposes its own costs on the system and often targets those least able to bear them. The refusal to remove discharged debts from borrowers' credit reports, for example, imposes extreme and unwarranted costs on debtors who have earned the protection of a bankruptcy discharge.¹⁶² The collection of time-barred debt, in addition to other failures to comply with the requirements of the claims-resolution process, burdens the court's machinery, taxes the already heavy workloads of chapter 7 and 13 trustees, and can affect the bottom line of creditors and debtors alike.¹⁶³

Second, concerns of cost and inefficiency are often concerns of degree, and not reasons to abandon private enforcement entirely. Legislators can avoid over enforcement and improve efficiency *ex ante* by thoughtfully tailoring an enforcement regime to the needs of an individual case.¹⁶⁴ Lawmakers need not work through these issues on a blank slate. Much academic work exists to help lawmakers craft a private enforcement regime that leverages the benefits of private litigation while minimizing its drawbacks.¹⁶⁵ For example, Maria Glover has created a comprehensive framework for lawmakers to follow in order to tailor private litigation structures to the unique enforcement needs of a situation:

[A]ll things being equal, enforcement mechanisms should be entrusted and tailored to the needs of the regulator with superior command of information relevant to potential wrongdoing [P]rivate enforcement mechanisms should be integrated with other regulatory efforts when necessary to effectuate the complete range of remedies provided in a given scheme, but carefully calibrated so as not to generate substantial remedial overkill [E]valuation of private enforcement mechanisms, particularly under preemption doctrines, should explicitly include consideration of the

¹⁶² See *supra* text accompanying notes 20–21.

¹⁶³ See Bruce, *Debt Buyers Beware*, *supra* note 3, at 1.

¹⁶⁴ See *supra* Part III(C)(i).

¹⁶⁵ See, e.g., Alexandra P. Everhart Sickler, *The (Un)fair Credit Reporting Act*, 28 LOY. CONSUMER. L. REV. 238, 281 (2016) (explaining how to better calibrate the FCRA's private enforcement regime).

extent to which those mechanisms are necessary to a regime's comprehensive regulation of harm [F]inally, even when a regulatory scheme allocates enforcement authority to public regulatory bodies with informational advantages relative to private parties, and even when a public regulatory scheme technically provides for complete and comprehensive regulation of wrongdoing, to the extent those regimes are characterized by significant underenforcement and regulatory failure on the part of the public regulatory body, appropriate enforcement mechanisms should be allocated to private parties for the achievement of regulatory goals.¹⁶⁶

In addition, the Bankruptcy Code itself can provide guidance to lawmakers. Since the Bankruptcy Code was enacted in 1978, several rounds of reforms have targeted various types of bankruptcy abuse.¹⁶⁷ These amendments have taken a variety of approaches, implementing public, private, and hybrid enforcement structures.¹⁶⁸ Empirical study on the effectiveness of past amendments to the Bankruptcy Code might provide useful bankruptcy-specific guidance on the most effective enforcement structures. Comparing, for example, the effects of the rules governing bankruptcy petition preparers¹⁶⁹ with similar constraints on debt relief agencies as a result of BAPCPA¹⁷⁰ would provide both a sense of how well these rules are currently deployed and a framework for moving forward.

¹⁶⁶Glover, *supra* note 6, at 1177–78 (footnotes omitted).

¹⁶⁷*See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 27, 38; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3100–01; Bankruptcy Amendments and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 355; Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2609.

¹⁶⁸*See* sources cited *supra* note 167.

¹⁶⁹*See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 308, 312, 108 Stat. 4106, 4135, 4138, 4140 (heavily favoring private enforcement).

¹⁷⁰*See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 227, 119 Stat. 23, 67 (relying more heavily on public regulators).

3. Would Enhancing the Role of Private Litigation in Bankruptcy Cause Judges to Interfere with Policy Development?

As noted above, some scholars are critical of private litigation because it allows judges to step into the role of policymakers, generating fragmented or perhaps contradictory results.¹⁷¹ One scholar noted:

As compared to a more centralized, unified, and integrated administrative scheme, orchestrated by an administrator at the top of a hierarchical agency with powers of national scope, when a large role is given to private litigation in implementation, resulting policy will tend to be confused, inconsistent, and even straightforwardly contradictory.¹⁷²

This concern, however relevant outside of bankruptcy, has little place in our current bankruptcy system. Unlike most federal statutes, which are developed and enforced by administrative agencies, bankruptcy lacks a central rulemaking body.¹⁷³ As such, as a matter of institutional design, “Congress has located primary responsibility for bankruptcy policymaking within the federal judiciary.”¹⁷⁴ While some scholars have argued in favor of a federal agency to oversee the bankruptcy process,¹⁷⁵ no such agency currently exists. As such, federal judges act in accordance with their delegated authority when they resolve lawsuits that affect the development of bankruptcy policy.

IV. CLARIFYING THE ROLE FOR PRIVATE LITIGATION IN BANKRUPTCY

The prior Part introduced the concept of private enforcement as one component of an overall regulatory structure. It argued that debtors in bankruptcy, as well as case trustees and even creditors, are well positioned to advance private claims. This section identifies avenues through which private litigation might be employed.

Private litigation structures, if pursued in bankruptcy, could take a variety of forms. The options range from informal—requiring little more than the ingenuity of counsel and open-minded judges—to more formal

¹⁷¹ Burbank et al., *supra* note 119, at 667.

¹⁷² *Id.*

¹⁷³ See Pardo & Watts, *supra* note 52, at 386.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

law-reform initiatives. This section briefly sketches several options, at various stages of development, that increase the bankruptcy system's reliance on private parties to regulate bankruptcy law.

A. *Bankruptcy Code Amendments to Clarify Private Rights of Action*

An ambitious path to increase private litigation in consumer bankruptcy cases is to amend the Bankruptcy Code to develop new private rights of action. At present, debtors may face a variety of harms that are not accompanied by an express private right of action in the Bankruptcy Code.¹⁷⁶ Some courts find these claims remediable through civil contempt sanctions¹⁷⁷ or through the court's § 105 powers,¹⁷⁸ while others have found a private right of action implied under certain circumstances.¹⁷⁹ The proper remedies available in the absence of express rights of action are the subject of deep controversy.¹⁸⁰ Clarifying where private lawsuits are appropriate would limit costly litigation over the availability of a remedy and improve access to justice in the areas targeted for reform.

¹⁷⁶ See Bruce, *Debtor Class*, *supra* note 3, at 21.

¹⁷⁷ *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (suit for violation of § 524 may be brought as a contempt action); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422–23 (6th Cir. 2000) (same). *But see In re Joubert*, 411 F.3d 452, 453 (3rd Cir. 2005) (dismissing case because no private right of action exists). Although courts diverge on the extent of Article I bankruptcy courts' inherent powers, most courts acknowledge that bankruptcy judges possess some form of civil contempt authority, whether inherent or statutorily granted. *See generally* 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Alan N. Resnick & Henry J. Sommers eds., 16th ed. (collecting cases)).

¹⁷⁸ *See, e.g., Rojas v. Citi Corp Trust Bank FSB (In re Rojas)*, No. 07-70058, Adv. No. 09-07003, 2009 WL 2496807, at *6 (Bankr. S.D. Tex. Aug. 12, 2009) (holding statutory contempt power under § 105 permits courts to order monetary relief for violations of the discharge injunction); *Padilla v. GMAC Mortg. Corp. (In re Padilla)*, 389 B.R. 409, 433 (Bankr. E.D. Pa. 2008) (holding relief may be granted under § 105 to remedy violations of § 1327); *Dean v. First Union Mortg. Corp. (In re Harris)*, 280 B.R. 876, 880 (Bankr. S.D. Ala. 2001) (holding § 105 permits monetary relief for violations of § 1322(b)(5)).

¹⁷⁹ Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 80 (2003) (arguing in favor of an implied right of action to remedy violations of § 524).

¹⁸⁰ *See, e.g., Alan M. Ahart, The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J., Winter 2005, at 1, 33 (“A bankruptcy judge should not . . . imply private rights of action under the Bankruptcy Code simply because it is equitable to do so . . .”).

Lawmakers that develop new private enforcement mechanisms have an array of legislative choices for tailoring the remedy to consumer bankruptcy's needs. Deciding which parties will have standing to bring suit, the remedies that will be available, whether claims can be aggregated, and who will bear the costs of litigation are all considerations that dramatically alter the character of the remedy.¹⁸¹ Any law reform initiatives to encourage private litigation ought to be adopted with careful attention to the overall regulatory framework. These initiatives must consider factors such as the extent of overlapping enforcement authority between public and private regulators to reach an optimal level of regulation, as well as the incentives necessary to permit bankruptcy participants to employ them.¹⁸² As noted above, ample guidance exists in both the scholarly literature and the Bankruptcy Code's past to guide legislators' decision-making on these topics.

The time is ripe to consider these issues. In March 2017, the American Bankruptcy Institute announced the formation of a commission to study potential reforms of the consumer bankruptcy process.¹⁸³ This commission will examine the need for reforms in chapter 7 and 13 cases and draft a comprehensive report that can serve as the blueprint for future legislative change. The commission should consider both the role private enforcement mechanisms can play in policing the bankruptcy process, as well as the means to tailor these mechanisms to achieve positive results in consumer bankruptcy cases.

Looking beyond formal law reform efforts, a variety of informal initiatives can be embraced to increase the incidence of private litigation in the bankruptcy system. I discuss these alternatives in the following parts.

B. Debtor Class Actions and Non-Class Aggregation

Debtor class action cases have been around since the 1990s. They did not experience much initial success because of perceived problems of subject matter jurisdiction.¹⁸⁴ The bankruptcy process has always been

¹⁸¹ See Burbank et al., *supra* note 119, at 671; Sickler, *supra* note 165, at 282.

¹⁸² See Burbank et al., *supra* note 119, at 677–78 (discussing litigation incentives).

¹⁸³ *ABI Announces Commission on Consumer Bankruptcy*, AM. BANKR. INST. (Mar. 13, 2017), <http://www.abi.org/newsroom/press-releases/abi-announces-commission-on-consumer-bankruptcy>.

¹⁸⁴ *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 687 (Bankr. N.D. Ill. 1999); *Lenior v. GE Capital Corp. (In re Lenior)*, 231 B.R. 662, 662 (Bankr. N.D. Ill. 1999);

strongly centered on the individual debtor and her estate. As such, many early courts found that “assert[ing] jurisdiction over a class of persons that include[s] not only the debtor before it but debtors in bankruptcy courts across the nation . . . is . . . problematic and out of step with the basic concern of the bankruptcy court.”¹⁸⁵

Courts have more recently acknowledged that these knee-jerk reactions to debtor class actions are misplaced.¹⁸⁶ Indeed, federal bankruptcy jurisdiction provides few limitations on debtor class action litigation.¹⁸⁷ As such, most courts have discredited lenders’ challenges to these cases based on subject matter jurisdiction. In so doing, some courts have underscored the importance of debtor class actions to bankruptcy’s remedial structure.¹⁸⁸

Debtor class actions are an attractive response to consumer bankruptcy’s enforcement gap for a number of reasons. First, they decrease the financial and informational burdens on consumers facing bankruptcy harms. Attorneys who observe a certain type of misconduct in their clients’ cases can simultaneously address the issues for all of their clients, which economizes on legal costs and generates a higher level of litigation than otherwise would be possible on an individual basis. Second, debtor class actions are a remedy that requires no complicated law reform measures to be effective. On the contrary, for debtor class actions to become a meaningful check on lender behavior, attorneys only need litigate these cases.

At least at present, pursuing debtor class action cases requires developing relatively new legal theories against the significant headwinds of a well-resourced adversary. Moreover, plaintiffs’ counsel must grapple with efforts by creditor-defendants to disable class litigation by contractual arbitration

Simmons v. Ford Motor Credit Co. (*In re Simmons*), 237 B.R. 672, 676 (Bankr. N.D. Ill. 1999); Wiley v. Mason (*In re Wiley*), 224 B.R. 58, 64 (Bankr. N.D. Ill. 1998).

¹⁸⁵Cline v. First Nationwide Mortg. Corp. (*In re Cline*), 282 B.R. 686, 694 (W.D. Wash. 2002) (holding that the court lacked jurisdiction of a nationwide class).

¹⁸⁶See Chiang v. Neilson (*In re Death Row Records, Inc.*), No. 06-11205, Adv. No. 10-02574, 2012 WL 952292, at *12 (B.A.P. 9th Cir. Mar. 21, 2012); Wilborn v. Wells Fargo Bank, N.A. (*In re Wilborn*), 609 F.3d 748, 750 (5th Cir. 2010); Harker v. Wells Fargo Bank, N.A. (*In re Krause*), 414 B.R. 243, 255–56 (Bankr. S.D. Ohio 2009); Rojas v. Citi Corp Trust Bank FSB (*In re Rojas*), No. 07-70058, Adv. No. 09-07003, 2009 WL 2496807, at *1 (Bankr. S.D. Tex. Aug. 12, 2009); Cano v. GMAC Mortg. Corp. (*In re Cano*), 410 B.R. 506, 550–51 (Bankr. S.D. Tex. 2009).

¹⁸⁷See Bruce, *Debtor Class*, *supra* note 3, at 44–69.

¹⁸⁸See, e.g., *In re Jones Order*, *supra* note 88, at 18 (underscoring that class actions “serve a valuable remedial role”).

waivers that bar class-action relief. Although the Consumer Financial Protection Bureau issued a rule in mid-2017 that would have restricted the use of pre-dispute arbitration class waivers in consumer contracts,¹⁸⁹ Congress voted to override the rule before it went into effect.¹⁹⁰ I argue elsewhere that arbitral claim waivers are unenforceable in bankruptcy to the extent that they impair the vindication of bankruptcy rights.¹⁹¹ As such, debtors in bankruptcy might have a unique ability to assert their claims on a class wide basis.

A growing body of class action case law will, in time, provide litigants and courts with effective roadmaps. In the meantime, sharing information is key. Lawyers should share information and resources about the developing use of class actions, speak at professional events about their cases, and publish articles and essays in legal journals. Judges can stay informed about these issues and interpret ambiguities or matters of first impression with an eye toward the goals of deterrence.¹⁹² In addition, when judges tackle nascent legal issues affecting private litigation, they should publicize their opinions on legal search engines in order to provide guidance to litigants and courts in other jurisdictions.¹⁹³

Nevertheless, class relief will remain remote for certain types of plaintiffs.¹⁹⁴ Debtor classes, like plaintiff classes outside of bankruptcy, must satisfy Rule 23's requirements of numerosity, commonality, typicality, and adequacy of representation, as well as one or more of Rule 23(b)'s requirements, to be certified.¹⁹⁵ "Over the last several years, federal courts have ratcheted up the evidentiary standards for class certification, requiring more proof at the class certification stage than previously required. In addition, a line of recent decisions has made various elements of

¹⁸⁹ See Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

¹⁹⁰ Andrew Ackerman & Yuka Hayashi, *Congress Makes it Harder to Sue the Financial Industry*, WALL STREET JOURNAL (Oct. 24, 2017), <https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968>.

¹⁹¹ Bruce, *Vindicating*, *supra* note 3, at 457, 460 (arguing that class arbitration waivers are unenforceable in bankruptcy class actions).

¹⁹² See Bruce, *Debtor Class*, *supra* note 3, at 71 (discussing opportunities where courts can advance private litigation by interpreting conflicting case law to favor private remedies).

¹⁹³ See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 519–21 (2016) (illustrating how some district court opinions may avoid detection by Westlaw and highlighting the value in widespread availability of district court precedents).

¹⁹⁴ See Bruce, *Vindicating*, *supra* note 3, at 479 (discussing class certification challenges).

¹⁹⁵ See FED. R. BANKR. P. 7023 (incorporating FED. R. CIV. P. 23 into bankruptcy).

certification markedly more difficult to achieve.”¹⁹⁶ Moreover, the U.S. House of Representatives recently passed two bills—the Lawsuit Abuse Reduction Act of 2017 and the Fairness in Class Action Litigation Act of 2017—that aim to further restrict use of the device.¹⁹⁷

In light of these challenges, seeking non-class consolidation mechanisms might be of some use. For example, judges have broad authority to consolidate actions within their district. First, Bankruptcy Rule 7042 permits judges to consolidate actions involving common questions of law or fact and issue a single resolution.¹⁹⁸ In addition, local bankruptcy rules in certain jurisdictions permit proceedings to be transferred to a single judge within the district to achieve even greater efficiency gains.¹⁹⁹ These forms of aggregation achieve some of the efficiencies while avoiding many of the pitfalls of class actions, including motions to compel arbitration and certification challenges. On a grander scale, the court system could embrace a multi-district litigation structure to resolve bankruptcy cases.

C. Asserting Non-Bankruptcy Claims

Debtors can also allege overlapping violations of federal and state consumer protection laws in addition, to or in lieu of, bankruptcy-specific remedies. Various types of bankruptcy-related misconduct might give rise to claims under the Fair Debt Collection Practices Act, the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Racketeer Influenced and Corrupt Practices Act, applicable state consumer protection law, or common law.

Asserting non-bankruptcy claims addresses the lack of private rights of action in many provisions of the Bankruptcy Code. For example, courts are sharply divided on the proper remedy for violating the discharge injunction contained in § 524 of the Bankruptcy Code.²⁰⁰ Although some scholars have argued that the Code should be amended to include an express private

¹⁹⁶ Bruce, *Vindicating*, *supra* note 3, at 479–80 (footnote omitted).

¹⁹⁷ H.R. 720, 115th Cong. (2017) (as passed by House); H.R. 985, 115th Cong. (2017) (as passed by House).

¹⁹⁸ See FED. R. BANKR. P. 7042.

¹⁹⁹ See, e.g., BANKR. N.D. CAL. R. 7042-1(d).

²⁰⁰ See Bruce, *Debtor Class*, *supra* note 3, at 62–63 (describing this controversy); Wasson, *supra* note 179, at 85, 87 (same).

right of action,²⁰¹ other scholars have highlighted that this practice already has a remedy in the common law concepts of rescission and restitution.²⁰²

Bringing claims for non-bankruptcy harms could also be beneficial for debtors, because these statutes are often calibrated to encourage private enforcement. For example, many have statutory damages, attorneys' fees provisions, and other litigation incentives. Moreover, bankruptcy courts have ample experience handling non-bankruptcy causes of action that arise in the course of a bankruptcy case.

Yet a threshold consideration is whether the Bankruptcy Court's existing remedial structure preempts (in the case of state-law claims) or impliedly repeals (in the case of federal claims) the non-bankruptcy remedies sought. Whether bankruptcy preempts or impliedly repeals a non-bankruptcy cause of action is a fact-specific inquiry that depends on the particular causes of action to be advanced.²⁰³ Yet as a general rule, the bankruptcy process does not purport to provide a comprehensive remedial framework, and many areas of the Code are easily augmented by non-bankruptcy causes of action.²⁰⁴

V. CONCLUSION

High volume and low costs are hallmarks of the consumer bankruptcy system. These features also leave the system vulnerable to overreaching by repeat players. Private litigation, if thoughtfully employed, could democratize the enforcement of bankruptcy laws, generating greater penalties for wrongful behavior than currently exist. This essay has laid some initial groundwork for how those results might be achieved, but it necessarily paints with a broad brush. Considering the role for private litigation in bankruptcy requires thoughtful and targeted study of the ends sought and the ideal mechanisms for achieving those ends.

²⁰¹ Wasson, *supra* note 179, at 80–81.

²⁰² See, e.g., Ralph Brubaker, *Implied Private Right of Action, Contempt, Preemption, Rescission, Restitution? Determining the Appropriate Remedy for Improper Reaffirmation Conduct*, 21 BANKR. L. LETTER NO. 2, February 2001 at 6, 8–9; Andrew J. Frank, *Restitution: Finally an Appropriate Remedy for Creditors' Abuse of Reaffirmation Agreements*, 19 BANKR. DEV. J. 143, 143 (2002).

²⁰³ For a discussion of implied repeal involving the FDCPA and the Bankruptcy Code, see Bruce, *Debt Buyers Beware*, *supra* note 3, at 5.

²⁰⁴ See Bruce, *Debt Buyers Beware*, *supra* note 3, at 5.