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2019 Winter Leadership Conference

WrestleMania: Who Wins When Consumer Protection Statutes Take On the Bankruptcy Code?

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American Bankruptcy Institute – 2019 Winter Leader Conference

The Intersection of the Bankruptcy Code and Consumer Protection Laws

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Regulation X. Regulation Z. The Fair Debt Collection Practices Act. The Fair Credit Reporting Act. Even in ordinary circumstances, mastering simultaneous compliance with these and other Federal and State consumer protection laws is no easy task. This is particularly true for institutions transacting with consumers across the country, as judicial interpretations of these regulations and statutes often vary by jurisdiction. When a consumer files a bankruptcy petition, however, the route to comprehensive compliance becomes even foggier.

Although bankruptcy is historically rooted in creditors' rights, it has grown into perhaps the ultimate form of consumer protection. Once a consumer enters the protection of bankruptcy and the automatic stay, the rights and obligations of creditors are modified and are likely to be modified further as the consumer reaches various milestones in his or her case (whether dismissal, confirmation of a plan, or a discharge of debts). Should a creditor, consumer reporting agency, or debt collector fail to account for these modifications, the debtor may have claims not only under the aforementioned Federal consumer protection schemes, but also for contempt of the discharge injunction, breach of the plan of reorganization, or violation of State consumer protection laws. These materials will explore prevailing issues and liability problems that arise when consumer protections schemes collide in bankruptcy.

I. Intersections in Bankruptcy: the Amended Mortgage Servicing Rules

A. Introduction

On October 19, 2016, the Bureau of Consumer Financial Protection (the “CFPB”) published in the Federal Register a set of amendments to the mortgage servicing rules previously issued in January of 2013.¹ These amendments (hereinafter, the “Amended Mortgage Servicing Rules”) revised Regulation X² and Regulation Z,³ which implement the Real Estate Settlement Procedures Act⁴ and the Truth in Lending Act,⁵ respectively. One notable aspect of the Amended Mortgage Servicing Rules is the inclusion of bankruptcy-specific requirements and modifications with respect to early intervention on delinquent home loans and periodic statements to borrowers.⁶

¹ Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (2016).

² 12 C.F.R. pt. 1024.

³ 12 C.F.R. pt. 1026.

⁴ 12 U.S.C. § 2601 *et seq.*

⁵ 15 U.S.C. § 1601 *et seq.*

⁶ After receiving substantial feedback from both consumer and industry advocates with respect to the bankruptcy-specific ambiguities and deficiencies in original mortgage servicing rules, the CFPB issued an Interim Final Rule on October 23, 2013 created a blanket bankruptcy exemption to the mortgage servicing rules. *See* 78 Fed. Reg. 62,993 (2013).

These bankruptcy-specific provisions in the Amended Mortgage Servicing Rules reflect the continuation of some general trends in consumer bankruptcy practice. First, there has been a trend toward increased employment of loss mitigation options, such as loan modifications, during and after a bankruptcy case. This is evidenced by an increase in the number of bankruptcy courts that have adopted formal loss mitigation programs, as well as directives from investors, bank regulators and government sponsored entities that specifically encourage loan modifications on loans impacted by bankruptcy – including loans impacted by a bankruptcy discharge. Second, there has been a trend toward real-time disclosure from creditors with respect to the financial status of loans during bankruptcy. The revisions to Official Form 410A in December of 2017 emphasize the demand for detailed financial disclosures as of the filing date. The addition of Rule 3002.1 to the Federal Rules of Bankruptcy Procedure in 2011 evidences a shift toward the formal disclosure of all fees, charges, payment changes, and post-petition delinquencies that might occur during the course of a bankruptcy, as well as a formal determination as to the precise status of the loan at the conclusion of a chapter 13 case. The Amended Mortgage Servicing Rules simply take these concepts further.

While the Amended Mortgage Servicing Rules provide relatively straightforward and logical guidance with respect to routine bankruptcy scenarios, these rules and their official interpretations have gaps that borrowers and creditors have been forced to fill on an *ad hoc* basis. For example, the definition of delinquency is elusive in the context of a chapter 13 case, given the debtor’s ability to cure mortgage loan defaults over the life of the plan. Moreover, the rules contain no guidance with respect to loans that have been charged off but also are impacted by a bankruptcy for purposes of sending a final periodic statement. Perhaps most importantly, the lack of consistent guidance among the Amended Mortgage Servicing Rules and other consumer protection statutes, such as the Fair Debt Collection Practices Act and the Bankruptcy Code, makes it exceedingly difficult to comply simultaneously with all relevant consumer protection statutes.

B. Early Intervention

On October 19, 2017, the Amended Mortgage Servicing Rules became effective with respect to early intervention requirements.⁷ “Early Intervention” refers to the contacts servicers must make with borrowers when mortgage loans cross certain delinquency thresholds. Generally, early intervention notices provide the borrower with information regarding loss mitigation options, contact information for the servicer’s loss mitigation specialists, and contact information for home ownership counselors.⁸ Early intervention can take the form of live contact or written notice.⁹

Because of concerns that contacts with a borrower regarding delinquent loans might run afoul of the automatic stay or the discharge order, Regulation X contains certain bankruptcy-related exemptions.¹⁰ With respect to live contact, Regulation X provides that while any borrower on a mortgage loan is in an active bankruptcy case, a servicer is exempt from the live contact requirements.¹¹ Under this exemption, while a bankruptcy case is pending the servicer is not

⁷ Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (2016).

⁸ See 12 C.F.R. §1024.39.

⁹ *Id.*

¹⁰ See 12 C.F.R. §1024.39(c).

¹¹ See 12 C.F.R. §1024.39(c)(1)(i).

required to establish or make good faith efforts to establish live contact with the borrower to inform the borrower about the availability of loss mitigation options.¹² The servicer must resume compliance with the live contact requirements at the earlier of dismissal, case closure, or reaffirmation.¹³ However, with respect to a mortgage loan for which the borrower has discharged personal liability, the servicer is not required to resume compliance with the live contact requirement.¹⁴

The CFPB's live contact bankruptcy exemption makes sense. Notwithstanding efforts to script live telephone conversations with borrowers, there remains substantial risk that within the flow of a conversation regarding loss mitigation, a representative of a creditor may say something that can be interpreted as a demand for payment. Communications that may cause confusion as to whether the debtor is being pressured to make a payment can be considered a stay violation.¹⁵ Accordingly, it is appropriate to eliminate the live contact requirement while a borrower is in bankruptcy.

With respect to written notice, Regulation X provides only a partial exemption. While any borrower on a mortgage loan is in an active bankruptcy case, a servicer is exempt from the written notice requirements if no loss mitigation options are available or any borrower on the loan has sent an FDCPA cease communication request.¹⁶ If no exemption applies and the loan is delinquent at the bankruptcy filing date, the servicer must send the written notice within 45 days after the filing date.¹⁷ The servicer must send only one written notice per bankruptcy case,¹⁸ which alleviates the concern that repeated contacts could be construed as a stay or discharge violation.

The only bankruptcy-related change to the content of the written early intervention notice is the requirement that the notice not include a demand for payment.¹⁹ However, the Official Interpretation to the early intervention requirement permits servicers to make adaptations for bankruptcy, noting that a servicer is "not required to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case."²⁰ Further, the Official Interpretation allows the servicer to send the written notice to the borrower's representative, including the borrower's bankruptcy counsel.²¹ Based on the Official Interpretation, and in order to mitigate risk related to potential stay or discharge violations, servicers may choose to communicate through counsel and to include prominent bankruptcy disclaimers on early intervention written notices.

As with the live contact requirements, a servicer must resume compliance with the written notice early intervention requirements at the earlier of dismissal, case closure, or reaffirmation.²² However, unlike the live contact requirement, the servicer must resume compliance with the

¹² *Id.*

¹³ See 12 C.F.R. §1024.39(c)(2)(i).

¹⁴ See 12 C.F.R. §1024.39(c)(2)(ii).

¹⁵ See *In re Cousins*, 404 B.R. 281, 289 (Bankr. S.D. Ohio 2009).

¹⁶ See 12 C.F.R. §1024.39(c)(1)(ii).

¹⁷ See 12 C.F.R. §1024.39(c)(1)(iii)(A).

¹⁸ See 12 C.F.R. §1024.39(c)(1)(iii)(C).

¹⁹ See 12 C.F.R. §1024.39(c)(1)(iii)(B).

²⁰ See Official Interpretation of 39(c) Borrower in Bankruptcy, 39(c)-2.

²¹ See Official Interpretation of 39(c) Borrower in Bankruptcy, 39(c)-1.

²² See 12 C.F.R. §1024.39(c)(2)(i).

written notice requirements on a mortgage loan for which the borrower has discharged personal liability if the borrower has made any partial or periodic payment after the commencement of the borrower's bankruptcy case.²³ This requirement appears to stem from a scenario in which a borrower has retained possession of a home without reaffirming the loan and is continuing to make voluntary payments post-discharge. While this requirement makes sense, it does present operational challenges for servicers and underscores the need for bankruptcy-specific modifications to the written notice, including prominent bankruptcy disclaimers. Even then, if a borrower has indicated an intent to surrender the property and has made only a few partial payments early in the case, this written notice requirement could prove problematic for servicers, as the written notice could be considered harassing.

The CFPB's early intervention written notice requirements, as set forth in Regulation X, generally make sense. Without limitation, it may be worthwhile to send a single written notice to the borrower – perhaps through counsel – notifying the borrower of potential loss mitigation options. However, practical complications persist. For example, the Amended Mortgage Servicing Rules provide no definition of delinquency in the context of bankruptcy. With a “maintenance and cure” plan, the loan may not be considered delinquent for purposes of late charges and penalties, but perhaps it is delinquent for purposes of early intervention. While there likely is little risk of sending the written early intervention notice within 45 days of the bankruptcy filing if the loan is contractually delinquent but subject to a maintenance and cure plan, there certainly is no guidance from the CFPB on this issue. Similarly, the risk of sanctions increases when a borrower has indicated an intent to surrender a home but has made at least one partial payment post-discharge. Without limitation, the required early intervention notice could be construed as an attempt to collect a discharged debt from a borrower that may have vacated the premises. While servicers can include disclaimers to mitigate risk, these gaps in the Amended Mortgage Servicing Rules can cause confusion for all parties involved.

C. Periodic Statements

On April 19, 2018, the Amended Mortgage Servicing Rules became effective with respect to requirements for periodic statements.²⁴ The rules set forth certain scenarios where the borrower's bankruptcy status creates an exemption from sending periodic statements.²⁵ To the extent no exemptions apply, the rules set forth certain modifications to reflect the bankruptcy status of the impacted loan.²⁶ However, even with fairly detailed coverage of routine bankruptcy scenarios, the rules leave gaps that have left parties guessing.

1. Exemptions

The Amended Mortgage Servicing Rules provide relatively logical bases for exemptions from sending periodic statements. A servicer is exempt from sending statements if any borrower on the mortgage loan is in an active bankruptcy case or has discharged personal liability for the

²³ See 12 C.F.R. §1024.39(c)(2)(ii).

²⁴ Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (2016).

²⁵ See 12 C.F.R. §1026.41(e)(5).

²⁶ See 12 C.F.R. §1026.41(f).

mortgage loan and one of the following conditions is met with respect to any consumer on the mortgage loan:

- The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;
- The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;
- A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. § 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or
- The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. § 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.²⁷

Any applicable exemption will cease to apply if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book.²⁸

2. Content

Section 1026.41(d) of the Amended Mortgage Servicing Rules generally covers the content of the periodic statements that servicers must provide to consumers, and Section 1026.41(f) outlines the modifications that servicers must make when a consumer is in an active bankruptcy case or has discharged personal liability for the mortgage loan. In essence, when a loan is impacted by bankruptcy, the statement may omit:

- The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received;
- The length of the consumer's delinquency;
- The possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured; and
- A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable.²⁹

These modifications represent the balancing act required when the periodic statement requirements are imposed in the bankruptcy context and reflect the impact that the automatic stay/discharge has

²⁷ See 12 C.F.R. §1026.41(e)(5)(i).

²⁸ See 12 C.F.R. §1026.41(e)(5)(ii).

²⁹ See 12 C.F.R. §1026.41(f)(1).

on a servicer's ability to collect payments. For consumers under any chapter of the Bankruptcy Code, the statements must include:

- A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan; and
- A statement that the periodic statement is for informational purposes only.³⁰

These required disclosures provide some cover for servicers in that there is an explicit recognition on the periodic statement that the servicer recognizes the impact of the bankruptcy filing and is not making a demand for payment. With respect to a mortgage loan in which any consumer with primary liability is a debtor in a Chapter 12 or Chapter 13 case, statements may omit certain the following information that is required outside of the bankruptcy context when the consumer is more than 45 days delinquent, as follows:

- Account history showing the previous six months or the period since the last time the account was current, whichever is shorter;
- A notice indicating any loss mitigation program to which the consumer has agreed, if applicable;
- The total payment amount needed to bring the account current; and
- HUD counseling information.³¹

These omissions apply only with respect to Chapter 12 and 13, as the rationale for Chapter 7 and Chapter 11 is that upon a borrower's exit from bankruptcy, the borrower needs to know where the account stands on a contractual (or contractually modified) basis. For that reason, the statements used for Chapter 7 and Chapter 11 cases more closely resemble non-bankruptcy statements in terms of financial data.

In Chapter 12 and Chapter 13 cases, the borrower is in more of a transitional status until there either is full performance under the plan or a dismissal or conversion. Accordingly, the Amended Mortgage Servicing Rules permit additional modifications, as follows:

- The "Amount Due" on the statement may be limited to the date and amount of post-petition payment due and any post-petition fees and charges imposed by the servicer.
- The "Explanation of Amount Due" on the statement may be limited to the monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest and escrow; the total sum of any post-petition fees or charges imposed since the last statement; and any post-petition payment amount past due.
- The "Transaction Activity" on the statement must include: all post-petition payments, all pre-petition payments, payments of post-petition fees and charges, and the post-petition fees and charges the servicer has imposed since last statement, although the source of payments need not be identified.

³⁰ See 12 C.F.R. §1026.41(f)(2).

³¹ See 12 C.F.R. §1026.41(f)(3)(i).

- If applicable, servicer must disclose information regarding the pre-petition arrearage, including the total of all pre-petition arrearage payments received since last statement, the total of all pre-petition arrearage payments received since beginning of the consumer's bankruptcy case, and the current balance of the consumer's pre-petition arrearage.³²

In a typical Chapter 13 case, these modified financial disclosures – coupled with the following disclaimers – should provide the borrower with a monthly snapshot of the status of the loan in the context of the bankruptcy case:

- A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;
- If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that that the consumer should send the payment directly to the trustee and not the servicer;
- A statement that the information disclosed on the periodic statement may not include payments made to the trustee and may not be consistent with the trustee's records;
- A statement that encourages the consumer to contact his/her attorney or the trustee regarding the application of payments; and
- If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.³³

3. Conflicts and Gaps

The content requirements, coupled with the disclaimers, harmonize well with Bankruptcy Rule 3002.1, which emphasizes the need for all parties in interest to remain on the same page with respect to loans secured by the borrower's principal residence. On the surface, the exemption and content requirements appear to cover all scenarios. However, implementation has revealed conflicts with other regulations, as well as gaps related to specific and bankruptcy and non-bankruptcy situations.

There are several instances where the Amended Mortgage Servicing Rules cover different account statuses without factoring in bankruptcy. For example, the Amended Mortgage Servicing Rules set forth an exemption for loans that have charged off, provided that the servicer sends a final statement with charge-off specific disclosures.³⁴ However, there are no provisions covering how a servicer can utilize the charge-off exemption for a loan that is impacted by bankruptcy but not otherwise subject to one of the enumerated bankruptcy-specific exemptions, leaving it to servicers to fashion their own version of a bankruptcy-modified final charge-off statement. Likewise, the Amended Mortgage Servicing Rules require servicers to send bankruptcy-specific periodic statements to a "successor in interest," such as a non-borrower that has inherited property subject to the mortgage or a non-borrower ex-spouse that has acquired the property through a

³² See 12 C.F.R. §1026.41(f)(3)(ii)-(v).

³³ See 12 C.F.R. §1026.41(f)(3)(vi).

³⁴ See 12 C.F.R. §1026.41(e)(6).

divorce decree.³⁵ However, the Amended Mortgage Servicing Rules provide no guidance on how a servicer can determine the bankruptcy status of a non-borrower, given that the servicer will not have a social security number with which to perform a bankruptcy search.

Additionally, there appear to be conflicts or ambiguities among the Amended Mortgage Servicing Rules and other regulations subject to the jurisdiction of the CFPB. Without limitation, the Fair Debt Collection Practices Act prohibits, subject to certain limited exceptions, a servicer's direct communication with a borrower represented by counsel.³⁶ In the frequently asked questions published on March 20, 2018, the CFPB provided no concrete guidance with respect to whether the periodic statements should be sent to the borrower or their counsel:

If a borrower in bankruptcy is represented by counsel, to whom should the periodic statement be sent? *In general, the periodic statement should be sent to the borrower. However, if bankruptcy law or other law prevents the servicer from communicating directly with the borrower, the periodic statement may be sent to borrower's counsel.*³⁷

This has led at least one consumer debtor's attorney to complain to the bankruptcy court that he should not be required to serve as a post office for servicers' communications to his clients.³⁸

D. Conclusion

While the bankruptcy-specific provisions in the Amended Mortgage Servicing Rules serve important functions, their implementation has revealed gaps that consumers and servicers will have to fill through sometimes costly and time-consuming trial and error. The increased utilization in bankruptcy of loss mitigation options is a positive development. However, without bankruptcy-specific modifications to the early intervention written notice, there is substantial risk of consumer confusion, and the CFPB provided no safe harbor language for servicers to include in the notices. Also, the post-discharge written notice requirement could prove to be problematic in the context of a borrower that surrendered property after making a post-petition payment. Likewise, the periodic statement requirements provide useful financial transparency during bankruptcy cases. However, the Amended Mortgage Servicing Rules have left gaps with respect to various scenarios, and the borrowers and servicers bear the burden of filling those gaps, whether with respect to charge-offs, successors-in-interest, attorney communications, or non-routine plan treatments. To the extent the CFPB can assist borrowers and servicers by filling known gaps and resolving regulatory conflicts, the Amended Mortgage Servicing Rules can better achieve their stated purposes.

II. Intersections in Bankruptcy: the Fair Debt Collection Practices Act

³⁵ See <https://www.consumerfinance.gov/policy-compliance/guidance/mortserv/mortgage-servicing-faqs/>

³⁶ See 15 U.S.C. §1692c(a)(2)

³⁷ See <https://www.consumerfinance.gov/policy-compliance/guidance/mortserv/mortgage-servicing-faqs/>

³⁸ *In re Ferguson*, United States Bankruptcy Court for the Northern District of New York, Bankruptcy Case Number 17-12324, Docket No. 30 at p. 2.

A. Introduction

The Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et. seq.* is an archaic statute enacted in 1977 to address abusive practices by third-party debt collectors who collect debts on behalf of others. Creditors, to this day, are exempted from the statute. At the time of its enactment, the Federal Trade Commission (FTC) was the primary regulator of the FDCPA but solely for enforcement. For some unexplained reason, Congress did not authorize the FTC with any rulemaking authority over the FDCPA. This has resulted in a patchwork of interpretations which has not benefitted consumers and debt collectors alike.

Ironically, in the Congressional findings and declaration of purpose, § 802 of the FDCPA³⁹ recognizes that “[a]busive debt collection practices contribute to the number of personal bankruptcies” Despite this outcome, the FDCPA and the Bankruptcy Code can collide on numerous occasions, yet neither provides any guidance as to which one prevails. Courts continue to struggle with these conflicts. Most recently, the United States Supreme Court⁴⁰ finally resolved the issue of the filing of a proof of claim on out of statute debt, a practice quite common in the bankruptcy arena, and held said practice does not violate the FDCPA. However, until that decision, debt collectors and consumers lived in an era of complete legal uncertainty.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) not only established the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) but gave the Bureau authority over various enumerated consumer protection laws, including rulemaking authority over FDCPA. The CFPB embarked on a 5-year rulemaking process and on May 6, 2019 published a Notice of Proposed Rule (NPR) for Debt Collection, Regulation F. Unfortunately, the NPR provides little to no guidance when it comes to the intersection of the FDCPA and the Bankruptcy Code. Although clearer rules of the road may assist both consumers and debt collectors in their interpretation of the FDCPA, how both statutes interact with each other remains unclear. Below are some examples where clarity is still needed.

B. Initial Communications to Consumer

The cornerstone of the debt collection process is the sending of a validation notice pursuant to § 809 of the FDCPA.⁴¹ This process not only identifies to the consumer who the debt collector is but the amount of the debt that is owed and the creditor to whom the debt is owed.⁴² The FDCPA requires that a validation notice be sent to the consumer, in writing, within five (5) days of the initial communication with the consumer. The validation notice may also be the first communication with a consumer, but the FDCPA does not require that the validation notice be in writing, although most debt collectors choose to communicate with the consumer in that fashion.

As we all know, however, timing is critical when it comes to bankruptcy. There are often delays in the notification of a consumer’s bankruptcy. Given the time constraints outlined in the FDCPA and the desire by many creditors, as well as the debt collectors they hire, to notify the consumer as quickly as possible of the outstanding obligation, friction can occur when a consumer

³⁹ 15 USC § 1692a.

⁴⁰ *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017).

⁴¹ 15 USC § 1692g(a).

⁴² *Id.*

receives a validation notice after a recent bankruptcy notice has been filed. However, is the sending of a required validation notice an attempt to collect a debt? Furthermore, if a consumer receives a validation notice prior to the filing of a chapter 13 bankruptcy but then receives a proof of claim after the bankruptcy petition has been filed, does that not create a significant amount of confusion for the consumer? As noted in the case of *In re Chaussee*,⁴³ the Ninth Circuit found that the validation provisions of the FDCPA clearly conflict with the claims process as contemplated by the Bankruptcy Code.⁴⁴

We are therefore puzzled as to how creditors can comply with both statutory schemes when the Code dictates they cease all collection actions, whereas FDCPA requires them to communicate with the debtor in connection with the collection of a debt.⁴⁵

The determination of whether the tension exists between the FDCPA and the Bankruptcy Code has not always been consistent. While facts in certain cases matter, the varied analysis of Congressional intent and purpose also comes into play.

C. FDCPA during the Bankruptcy Process

In the matter of *Simon v. FIA Card Services*, 732 F.3d 259 (3d Cir. 2013), a creditor, through its counsel served the consumer with a 2004 Notice of Examination in a bankruptcy proceeding. The notice did not comply with the Bankruptcy Code's procedural requirements. The debtors successfully quashed the examination for the failure to comply with Bankruptcy Rule 9016 and the subpoena requirements of Rule 45 of the Federal Rules of Civil Procedure. Thereafter the debtors filed a lawsuit against the law firm and the creditor alleging that the letter and the notice were false, deceptive and misleading pursuant to §§ 1692e(5),(11) & (13) of the FDCPA. The lower court found the claims were precluded by the Bankruptcy Code but the Third Circuit disagreed and rejected the analysis of the Ninth Circuit,⁴⁶ as well as a prior decision from the 2nd Circuit,⁴⁷ holding that communications that arise within the context of a bankruptcy proceeding cannot form the basis of an FDCPA claim. Instead the Third Circuit adopted the holding in *Randolph v. IMBS, Inc.*,⁴⁸ which found that “[w]hen two federal statutes address the same subject in different way the right question is whether one implicitly repeals the other”, meaning there is an “‘irreconcilable conflict’ between the statute or a clearly expressed legislative decision that one replace the other.”⁴⁹

D. Communications to the Consumer in General – Violation of the Automatic Stay, the Discharge Provisions of the Bankruptcy Code or the FDCPA?

The intersection of the Bankruptcy Code and the FDCPA is extremely prevalent in Chapter 13 matters, where a debtor continues to make payments to their creditors. In many instances

⁴³ 399 B.R. 225 (9th Cir. 2008).

⁴⁴ *Id.* at 238. (The facts in *In re Chaussee* pertained to the filing of a proof of claim, but the Court went further to analyzed the inconsistencies posed by the FDCPA and the Bankruptcy Code).

⁴⁵ *Id.*

⁴⁶ *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *In re Chaussee*, *supra*.

⁴⁷ *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2nd Cir. 2010).

⁴⁸ 368 F.3d 726 (7th Cir. 2004).

⁴⁹ *Id.* at 730.

lenders are required to send certain notices in order to comply with State laws governing foreclosures. Lenders or other creditors may want to send notifications of a returned check or missed payment. In many of these cases, the creditors walk a fine line between conveying information and seeking to collect a debt, which runs afoul of the Bankruptcy Code. There may also be instances where a communication is made post-discharge and the law is unclear whether the appropriate remedy rests with the Bankruptcy Court or through a civil action asserting an FDCPA violations.

Unfortunately, there is no consistency among the courts. In the case of *In re Roth*,⁵⁰ a mortgagee sent an informational statement, post discharge, after the debtor made voluntary payments on the mortgage. The consumer sought sanctions for violation of the discharge order and for claims under the FDCPA. Both the Bankruptcy Court and the District Court denied the sanctions and the FDCPA claims. The District Court made an interesting analogy with regard to the communications standards under the FDCPA and the Bankruptcy Code. Specifically under the FDCPA, the Court stated that the test is whether the “least sophisticated consumer” would interpret the statement as an attempt to collect the debt. Under the Bankruptcy Code the inquiry is whether the communication was an actual attempt to collect the debt.⁵¹ However in the case of *Garfield v. Ocwen Loan Servicing*,⁵² the Circuit Court found that Bankruptcy Code does not broadly repeal the FDCPA for purposes of FDCPA claims based on conduct that would constitute alleged violations of the discharge injunction. This is a departure from many court holdings which conclude that remedies for post communication discharge must be found solely within the Bankruptcy Code.⁵³

E. Conclusion

Both the FDCPA and the Bankruptcy Code present a significant amount of pitfalls for creditors and lending who are looking to comply with both statutes but ultimately end up violating both. While the recent release of the NPR by the CFPB will help to interpret the FDCPA, its proposals fail to speak directly to the conflicts as described above. However, the NPR does propose at Appendix C of Part 1006 to permit the issuance of advisory opinions from the CFPB. The FTC was given this authority when it had primary jurisdiction over the FDCPA and that authority has now been transferred to the CFPB. Consumers, creditors and lenders would be wise to utilize this process, especially when the requirements of the FDCPA and the Bankruptcy Code collide, in order to achieve clarity that is currently missing from the courts.

III. Intersections in Bankruptcy: the Fair Credit Reporting Act

A. Introduction

⁵⁰ 568 B.R. 139 (M.D. Fl. 2017).

⁵¹ *Id.* at 144.

⁵² 811 F.3d 86 (2nd Cir. 2016).

⁵³ *Walls, supra; Burchalewski v. Wolpoff & Abramson, LLP*, No. 06–CV–443S, 2008 WL 4238933, at *1, 2008 U.S. Dist. LEXIS 73625, at *5–6 (W.D.N.Y. Sept. 8, 2008) (no independent cause of action under the FDCPA for violation of the bankruptcy stay); *Peeples v. Blatt*, Case No. 00 C 7028, 2001 WL 921731, at *4, 2001 U.S. Dist. LEXIS 11869, at *13 (N.D.Ill. Aug. 14, 2001) (claims under both the Bankruptcy Code and the FDCPA can be maintained); *Necci v. Universal Fidelity*, 297 B.R. 376 (E.D. N.Y. 2003).

The Fair Credit Reporting Act (“FCRA”)⁵⁴ requires credit bureaus (or “consumer reporting agencies”), as well as creditors, debt collectors, and other furnishers of consumer credit data (collectively, “furnishers”), to report consumer credit information accurately, completely, and in a non-misleading manner. When a consumer reporting agency or furnisher is notified that information contained in a consumer’s credit report is inaccurate, incomplete, or otherwise misleading, the consumer reporting agency or furnisher is required to investigate the claim and make any necessary corrections.⁵⁵ A consumer reporting agency or furnisher that negligently fails to comply with these obligations may be held liable to the consumer for actual damages, costs and reasonable attorneys’ fees.⁵⁶ Willful violators of the FCRA are also subject to punitive damages.⁵⁷

In order for consumers to maximize their potential remedies, they must notify the applicable *consumer reporting agency* that the information contained in their credit report is inaccurate. The consumer reporting agency then notifies the furnisher of the dispute. Although the FCRA permits consumers to directly notify furnishers of inaccurate information in their credit reports,⁵⁸ the “consumer has no private right of action if the furnisher does not reasonably investigate the consumer’s claim after direct notification.”⁵⁹ Rather, the statutory scheme reserves enforcement of such violations to Federal and State governmental authorities.⁶⁰ Complaints that fail to allege that the consumer directly notified the *consumer reporting agency* (as opposed to direct notification of the *furnisher*) may be resolved rather easily with a straightforward motion to dismiss.⁶¹ This nuance has tripped up many a plaintiff.⁶²

In the event the preliminary elements are met, the furnisher’s liability will turn on whether the information reported was inaccurate,⁶³ and if so, the nature and extent of the furnisher’s investigation and response.⁶⁴ Specifically, the FCRA requires that the furnisher: (i) conduct an investigation of the disputed information; (ii) review all relevant information provided by the consumer reporting agency; (iii) report the results of the investigation to the consumer reporting agency; and (iv) if the investigation finds that the information is incomplete or inaccurate, then:

⁵⁴ See 15 U.S.C. § 1681 et seq.

⁵⁵ 15 U.S.C. § 1681e (consumer reporting agencies), § 1681s-2 (furnishers).

⁵⁶ 15 U.S.C. § 1681n.

⁵⁷ 15 U.S.C. § 1681o.

⁵⁸ See 15 U.S.C. § 1681s-2(a)(8).

⁵⁹ *Alcala v. Popular Auto, Inc.*, 828 F.Supp.2d 437, 439-440 (D.P.R. 2011).

⁶⁰ See 15 U.S.C. § 1681s-2(c).

⁶¹ See 15 U.S.C. § 1681s-2(b); *Ausar-EI v. Barclay Bank Delaware*, No. PJM-12-0082, 2012 WL 3137151, at *3 (D. Md. July 31, 2012).

⁶² See, e.g., *In re Zinn*, No. 13-14270-LSS, 2017 WL 218417, at *4 (Bankr. D. Md. Jan. 17, 2017) (“nowhere have [the plaintiffs] alleged that they reported the dispute to one or more credit agencies or that an agency notified either [furnisher] of the alleged inaccuracies”); *Chiang v. MBNA*, 634 F. Supp. 2d 164, 174 (D. Mass. 2009), aff’d, 620 F.3d 30 (1st Cir. 2010) (case dismissed where consumer provided notice to consumer reporting agency, but agency failed to notify furnisher); *Comunale v. Home Depot, U.S.A., Inc.*, 328 F. Supp. 3d 70, 80 (W.D.N.Y. 2018) (“Plaintiff fail[ed] to allege that any of the unidentified credit reporting agencies referred to in his Complaint rendered notice of a credit dispute to Defendants regarding the subject account”); *Campbell v. Wells Fargo Bank, N.A.*, 73 F. Supp. 3d 644, 651 (E.D.N.C. 2014) (“plaintiffs have not plausibly alleged in the [complaint] that they notified a consumer reporting agency of a dispute about their line of credit account”).

⁶³ *Deandrade v. Trans Union LLC*, 523 F.3d 61, 65-67 (1st Cir. 2008).

⁶⁴ See *Hernandez v. Wells Fargo Bank, N.A.*, No. 13-CV-13047-ADB, 2015 WL 4480839, at *3 (D. Mass. July 22, 2015) (furnisher liability turns not only on inaccuracy of information, but also on inadequacy of furnisher’s investigation and response).

(a) report those results to all other consumer reporting agencies that compile and maintain files on consumers on a nationwide basis and, (b) promptly modify, delete, or block the reporting of that information to consumer reporting agencies.⁶⁵

A consumer reporting agency, in turn, is required to maintain “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁶⁶ Accordingly, a consumer’s complaint against a furnisher (or consumer reporting agency) should identify any inaccurate information contained in the credit report, explain why that information is inaccurate,⁶⁷ provide sufficient detail of the notice given, and articulate any deficiencies in the furnisher’s or consumer reporting agency’s response.⁶⁸

B. The Effect of a Bankruptcy Filing

The filing of a bankruptcy petition complicates the credit reporting paradigm and creates special concerns for consumer reporting agencies and furnishers of consumer credit information, as the automatic stay raises an injunction against, among other things, any act to collect pre-petition debts against the debtor.⁶⁹ Although the specter of the automatic stay may foment some uncertainty about one’s rights and obligations in reporting delinquencies, the FCRA is clear that the fact of a bankruptcy is fair game for a credit report for 10 years from the date of filing (although most other adverse information must be removed after 7 years).⁷⁰ Indeed, some courts have held that the failure to note that a debtor is in bankruptcy could be misleading under the FCRA.⁷¹

As a general matter, the prudent course of action for furnishers informed of a consumer’s bankruptcy filing is to report the filing (including chapter) to the consumer reporting agencies. This is consistent with guidelines published by the Consumer Data Industry, Inc., such as Metro 2, which some courts have looked to as a benchmark for reasonableness under the FCRA.⁷² The consumer reporting agency should then update the consumer’s credit report to reflect the filing and applicable chapter of the bankruptcy. If the bankruptcy case is subsequently dismissed or

⁶⁵ 15 U.S.C. § 1681s-2(b).

⁶⁶ 15 U.S.C. § 1681e.

⁶⁷ There is some dispute among courts about the appropriate measure of inaccuracy. The First Circuit Court of Appeals has emphasized that the inaccuracy must be factual. *See Chiang v. Verizon New England Inc.*, 595 F.3d 26, 35 (1st Cir. 2010). Other courts have indicated that technically factual information may nonetheless be “materially misleading” if the consumer has a “potentially meritorious” dispute over the enforceability of the debt. *Hrebal v. Seterus, Inc.*, 598 B.R. 252, 269–270 (D. Minn. 2019).

⁶⁸ *See generally Hillis v. Trans Union, LLC*, 969 F. Supp. 2d 419, 421 (E.D. Pa. 2013) (“‘inaccurate’ information, in the FCRA context, refers to information that either is factually incorrect or creates a misleading impression”).

⁶⁹ 11 U.S.C. § 362(a)(6).

⁷⁰ *See* 15 U.S.C. § 1681c(a).

⁷¹ *Compare Wylie v. TransUnion, LLC*, No. 3:16-cv-102, 2017 WL 835205, at *7 (W.D. Pa. Mar. 2, 2017) (“failure to mention that the account is subject to the bankruptcy proceedings . . . might have rendered the report misleading”), with *Barry v. Experian Information Solutions, Inc.*, No. 2:16-cv-09515, 2018 WL 3341785, at *6 (S.D.W. Va. July 6, 2018) (“courts have rejected the proposition advanced by [the debtor] that the failure to report that an account is included in a Chapter 13 bankruptcy proceeding is incomplete for purposes of the FCRA”).

⁷² *See, e.g., Grossman v. Barclays Bank Delaware*, No. CIV.A. 12-6238 PGS, 2014 WL 647970, at *10 (D.N.J. Feb. 19, 2014). *Also compare Nissou-Rabban v. Capital One Bank (USA), N.A.*, 285 F. Supp. 3d 1136, 1150 (S.D. Cal. 2018) (“Metro 2 violation, standing alone, can support a claim under the FCRA”), with *Jones v. Experian Info. Sols., Inc.*, No. 1:11-CV-826, 2012 WL 2905089, at *5 (E.D. Va. July 16, 2012) (“mere fact that [furnisher] failed to consult an advisory external source, such as the CDIA Resource Guide, is of no consequence when its investigation otherwise reflects a careful and thorough inquiry into the consumer credit dispute”).

withdrawn by the debtor, the consumer reporting agency must update the report to reflect the fact that the case has been dismissed.⁷³ Note that voluntary dismissal does not mean that the bankruptcy will be removed from the credit report. Rather, the credit report may continue to reflect the bankruptcy filing for 10 years from the date of withdrawal.⁷⁴

Courts generally hold that the automatic stay does not bar furnishers from continuing to report a debtor's account balance, including delinquencies, after the filing of a Chapter 7 petition.⁷⁵ The furnisher's obligations become murkier, however, when reporting account balances and payment history in Chapter 13 or individual Chapter 11 cases. The confirmation of a plan creates questions about the proper metrics for debt reporting, namely whether the furnisher must report the status of the debt in reference to the debtor's prepetition contractual obligations or in reference to the debtor's modified contractual obligations under the confirmed plan.

For example, in *Barry v. Experian Information Solutions, Inc.*,⁷⁶ the debtor had modified her payment obligations to a creditor in her Chapter 13 plan. Although the debtor was making the payments required under the confirmed plan, the creditor continued to report delinquencies in reference to the debtor's prepetition obligations. The debtor brought suit under the FCRA. The court granted summary judgment to the creditor, reasoning that a confirmation order does not change the legal status of the debt and, as such, reporting the status of the prepetition debt was not inaccurate.

Conversely, in *Aulbach v. Experian Info. Sols., Inc.*,⁷⁷ the court reached the opposite conclusion. Recognizing widespread disagreement, even among judges within the same district, the court explained: "Chapter 13 confirmation does not merely change the debtor's obligation as a common sense matter. It also changes the legal status of the obligation."⁷⁸ In so holding, the court relied on guidance from the Consumer Data Industry Association as well as the language in section 1322(b)(2) of the Bankruptcy Code, which provides that a "plan may ... modify the rights of holders of secured claims . . . or of holders of unsecured claims."

The split in authority on this issue (in some instances among judges within the same jurisdiction) raises compliance problems for furnishers and consumer reporting agencies. Although furnishers and consumer reporting agencies may have solid arguments in defense of continued reporting of the original obligation, the safest course of action for avoiding litigation altogether would seem to be reporting compliance in reference to the confirmed plan. This includes reporting payments received during the plan and an appropriate reduction of the amount

⁷³ 15 U.S.C. § 1681c(d).

⁷⁴ See <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>, p. 56.

⁷⁵ See *In re Franklin*, No. 09-13399-JMD, 2017 WL 3701214, at *7 (Bankr. D.N.H. Aug. 24, 2017) ("a majority of courts hold that the postpetition reporting of overdue or delinquent payments to credit reporting agencies, without intent to harass or coerce payment, is not a per se violation of the automatic stay"); *In re Porcoro*, 565 B.R. 314, 327 (Bankr. D.N.J. 2017) (same). Cf. *Polvorosa v. Allied Collection Serv., Inc.*, No. 216CV1508JCMCWH, 2017 WL 29331, at *3 (D. Nev. Jan. 3, 2017) ("reporting delinquencies during the pendency of a bankruptcy or during a bankruptcy's automatic stay is not itself a violation of the FCRA").

⁷⁶ 2018 WL 3341785 (S.D.W. Va. July 6, 2018).

⁷⁷ 251 F. Supp. 3d 1281 (N.D. Cal. 2017).

⁷⁸ *Id.* at 1286.

outstanding. If a case is dismissed, the furnisher can revert to the prepetition amount, subject of course to any payments made during the case.

C. Reporting Discharged Debt

If the debtor is successful in obtaining a discharge (regardless of the chapter), furnishers and consumer reporting agencies should ensure that the credit report does not give the false impression that the debt is still due and owing. Because a discharged debt still technically exists, the report may be updated to show either a zero-dollar balance or the actual outstanding balance with a notation that the debt has been discharged. A furnisher (or consumer reporting agency) that fails to update a consumer's credit information consistent with the debtor's discharge, so as to create the misleading impression that debtor is still personally liable, may find itself liable under the FCRA.

Compliance with the FCRA, however, does not provide a safe harbor from all potential attacks by the debtor. Specifically, mere accuracy will not provide a safe-harbor for furnishers who attempt to use credit reporting in a coercive manner against discharged debtors.⁷⁹ Courts have also held that regardless of what the FCRA requires with respect to discharged debts, the failure to update a credit report to reflect a discharge may be a violation of the discharge injunction created by section 524 of the Bankruptcy Code.⁸⁰

Establishing a discharge violation requires the application of a different standard than that imposed under the FCRA or FDCA. Rather than showing a negligent investigation, for example, the debtor must meet the standard for civil contempt. Until very recently, bankruptcy courts across the country were applying significantly different standards for what constitutes civil contempt of the discharge injunction. In *Taggart v. Lorenzen*, however, the Supreme Court adopted a new standard to be applied uniformly: "A court may hold a creditor in civil contempt for violating a discharge order where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order."⁸¹ In other words, the question is whether the creditor's reading of the discharge order (giving rise to its conduct) was objectively unreasonable.

Although it remains to be seen how this new standard will be applied, it will no doubt remain important to distinguish between the mere failure of a creditor to remove a discharged debt from a credit report,⁸² and intentionally leaving a discharged debt on a credit report "to induce a debtor to make payments on an account."⁸³ Although the line may be fuzzy in cases of a failure to update, the line is clear and bright when it comes to affirmative conduct in derogation of the

⁷⁹ See *In re Zine*, 521 B.R. 31, 39-40 (Bankr. D. Mass. 2014) ("technically accurate credit reporting does not, by itself, immunize the act from the discharge injunction.").

⁸⁰ "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. 524(a)(2). See, e.g., *In re Torres*, 367 B.R. 478, 487-88 (Bankr. S.D.N.Y. 2007) ("credit report that continues to show a discharged debt as 'outstanding,' 'charged off,' or 'past due' is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor").

⁸¹ *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019).

⁸² *In re Irby*, 337 B.R. 293, 297 (Bankr. N.D. Ohio 2005) (no discharge violation).

⁸³ *In re McKenzie-Gilyard*, 388 B.R. 474, 487 (Bankr. E.D.N.Y. 2007) (potential discharge violation).

discharge. For example, in *In re Zine, supra*,⁸⁴ the furnisher sent inaccurate information to the consumer reporting agency, called the debtor on multiple occasions, and sent the debtor delinquency notices. In light of the totality of the conduct, the bankruptcy court held that the furnisher had violated the discharge injunction notwithstanding its disclaimer advising the consumer to ignore the communication if its debt had been discharged.

D. Limitations on Credit Reporting Liability

Aside from the discharge injunction, a debtor's ability to look beyond the FCRA for causes of action is constrained. Most notably, the FCRA specifically preempts State laws to the extent they "relat[e] to the responsibilities of persons who furnish information to consumer reporting agencies."⁸⁵ As a result, courts have rejected attempts by consumers to hold furnishers liable under State statutes prohibiting unfair and deceptive conduct against consumers, such as Mass. Gen. Laws ch. 93A, at least in the absence of evidence of a malicious or willful intent to injure.⁸⁶

The FCRA does exclude various State credit reporting requirements from its preemptive scope.⁸⁷ But that does not necessarily mean the consumer has a right to enforce those requirements. For example, the FCRA does not preempt Mass. Gen. Laws ch. 93, section 54A(a), a State statute requiring furnishers to follow reasonable procedures to ensure that the information reported to a consumer reporting agency is accurate and complete.⁸⁸ Another subsection of that State statute, section 54A(g), creates a cause of action arising from the failure to comply with section 54A(a). However, the FCRA does not explicitly save section 54A(g) from preemption. As a result, some courts have rejected private causes of action to enforce section 54A(a) notwithstanding the fact that it is not expressly preempted.⁸⁹

E. Conclusion

The FCRA falls within the general ambit of "consumer protection statutes" and, like other Federal and State statutes, was enacted with specific objects in mind that are accomplished through a myriad of requirements on businesses in the financial services and credit industries, and stiff consequences for failure to meet those requirements. The Bankruptcy Code is perhaps the ultimate consumer protection statute in that its far broader menu of relief may be invoked in a manner that fundamentally alters the debtor-creditor relationship. Unfortunately, these statutes often do not

⁸⁴ 521 B.R. at 39-40.

⁸⁵ 15 U.S.C. § 1681t(b)(1)(F). *But see* 15 U.S.C. § 1681h ("Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information . . . except as to false information furnished with malice or willful intent to injure such consumer.").

⁸⁶ *See, e.g., Catanzaro v. Experian Info. Sols., Inc.*, 671 F. Supp. 2d 256, 262 (D. Mass. 2009); *Hindle v. Toyota Motor Credit Corp.*, No. CV 18-11306-FDS, 2018 WL 6033484, at *4 (D. Mass. Nov. 16, 2018).

⁸⁷ *See generally* 15 U.S.C. § 1681t. *See, e.g.,* M.G.L. c 93, §§ 54A(a), 59(d)-(e); Me. Rev. Stat., tit. 10, § 1316.2; N.J. Rev. Stat., § 56:11-37.10(a)(1); Vt. Stat., tit. 9, § 2480c(a)(1).

⁸⁸ 15 U.S.C. § 1681t; M.G.L. c 93, § 54A(a).

⁸⁹ *See, e.g., Lance v. PNC Bank, N.A.*, No. 15-10250-FDS, 2015 WL 5437090, at *4 (D. Mass. Sept. 15, 2015); *Kuppserstein v. Bank of Am., Nat'l Ass'n*, No. CV 14-13766-GAO, 2015 WL 4601704, at *3 (D. Mass. July 31, 2015). *But see Catanzaro, supra* at 261 (concluding that cause of action pursuant to § 54A(g) was not preempted).

generally speak with one another, leaving the courts to referee the ensuing battle between statutory provisions of similar policy origins.