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U.S. SUPREME COURT UPDATE WITH WANDA BORGES & BRUCE NATHAN: SUPREME COURT CASES AND DECISIONS THAT COULD IMPACT TRADE CREDITORS

PRESENTATION FOR:

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PRIORITY RULES AND STRUCTURED DISMISSALS

Jevic Facts

- In 2006, Jevic Transportation Inc., a New Jersey Trucking Company, Was Acquired By Sun Capital Partners Through a Leveraged Buyout
- Sun Capital Financed the Buyout With Funds Loaned by Lender Group Led by CIT Group Saddling Jevic With Secured Debt Exceeding $50 million owing to CIT and Sun Capital
- By May 2008, Jevic's Financial Condition Worsened Significantly
  - Jevic halted almost all operations
  - On May 19, 2008, Jevic notified employees of their imminent termination
  - On May 20, 2008, Jevic filed Chapter 11 in Delaware

Jevic Facts – Claims

- On Chapter 11 Filing Date
  - CIT and Sun Capital had secured claims totaling $53 million
  - Jevic owed more than $20 million to taxing authorities and general unsecured claims

The WARN Act Lawsuit

- A Group of Drivers Whose Employment Jevic Had Terminated Sued Jevic and Sun Capital For Violations of WARN Act (Workers Adjustment and Retraining Notification Act), Federal Law that Requires At Least 60 days Notice before Employee Termination
- Delaware Bankruptcy Court Granted Summary Judgment in Drivers' Favor
  - Judgment total - $12.4 million
  - $8.3 million of judgment granted priority status as a wage priority claim

Creditors' Committee Lawsuit vs. CIT and Sun Capital

- Creditors' Committee Sued CIT and Sun Capital Alleging Fraudulent Conveyance Claims Arising From LBO, Seeking to Avoid Secured Debt
- Jevic, Sun Capital, CIT, and the Creditors' Committee Settled Fraudulent Conveyance Action
  - CIT agreed to pay Committee's legal fees and administrative expenses
  - Sun Capital agreed to transfer its lien in Jevic's remaining cash, $1.7 million, to a trust to:
    - Pay taxes and chapter 11 administrative expenses
    - Provide for distribution to general unsecured claims
    - Settlement ignored drivers' $8.3 million priority claim
  - Jevic's chapter 11 case would be dismissed – a "structured dismissal" and Sun and CIT would receive releases

Structured Dismissal of Jevic Chapter 11 Case

- Jevic, Sun Capital, CIT and Creditors' Committee Moved for Bankruptcy Court Approval of Settlement and for "Structured Dismissal" of Jevic Chapter 11 Case
- Drivers Objected, Arguing Settlement Violated Bankruptcy Code's Priority Rules By Not Providing For Payment of Drivers' Wage Priority Claims Prior to Any Distribution to Lower Priority General Unsecured Creditors

Bankruptcy Code Claims Priority Rules

Secured Claims

↓

Administrative Expense Claims

↓

Lower Level Priority Claims
(Includes Wage Priority Claims)

↓

General Unsecured Claims

↓

Equity

Priority Wage Claims Rules

- Second Level Priority Claims
  - Wages/salaries/compensation earned within 180 days of the bankruptcy filing up to $12,850 per employee
  - Employee benefit plans: claims for contributions for services rendered within 180 days of bankruptcy filing to the extent of $12,850 multiplied by number of employees covered by plan less amounts paid on account of wage/salary priority claim
  - Certain taxes/other priority claims

What Is a Structured Dismissal?

- Bankruptcy Code Provides Following Exit Strategies For A Chapter 11 Debtor
  - Approval of a Chapter 11 plan
  - Conversion to Chapter 7
  - Dismissal of case
- Structured Dismissal, a Hybrid Not Provided For in the Bankruptcy Code
  - Chapter 11 case is dismissed
  - Usually done in conjunction with settlement with secured lender
    - Sometimes, settlement proceeds distributed to lower priority general unsecured creditor classes, despite nothing paid to higher priority creditors
    - Releases granted

Lower Court Decisions

- Delaware Bankruptcy Court Approved Settlement and "Structured Dismissal" of Jevic Case
  - Court found that the settlement's violation of Bankruptcy Code priority rules (providing for distribution to general unsecured creditors while ignoring higher wage priority driver WARN Act claims) not per se bar to approval
  - "Dire Circumstances" present in case justified approval of settlement and dismissal
    - No chapter 11 plan likely
    - Conversion to chapter 7 not likely due to lack of funds
    - Drivers would fare no better if settlement is not approved

Lower Court Decisions

- Delaware District Court And U.S. Third Circuit Court of Appeals Affirmed Bankruptcy Court's Holding
- Third Circuit Held:
  - Structured dismissal need not respect Bankruptcy Code's priority rules in every case
  - "Absolute Priority rule (no junior class of creditors can be paid prior to full payment of senior classes) does not apply outside of Chapter 11 plan process
  - "Rare instances," like those in *Jevic* justify approval of structured dismissal that deviates from Bankruptcy Code's priority rules

U.S. Supreme Court's Reversal

- Issue Before The U.S. Supreme Court:
  - Can a bankruptcy court approve a structured dismissal of a Chapter 11 case that provides for distributions deviating from the Bankruptcy Code's priority rules?
  - Simple answer: No
- Reasons For Decision:
  - Strict adherence to Bankruptcy Code's priority rules
  - Recognition of need to maintain protections conferred by Bankruptcy Code's priority provisions
  - Bankruptcy Code's priority rules are fundamental
  - Nothing in Bankruptcy Code justified violating priority rules
  - No cause under Bankruptcy Code Section 349(b) exists to allow for distributions to creditors as part of the dismissal of a case in violation of bankruptcy priority rules

Other Aspects of Supreme Court's *Jevic* Decision

- In *Dicta*, the Supreme Court Also Mentioned the Following Interim Distributions that In the Appropriate Circumstances May Not Violate the Bankruptcy Code's Priority Rules. Examples:
  - Critical vendor orders
  - Pre-Petition wage payment orders
  - Chapter 11 financing rollups allowing pre-petition secured lenders that continue financing a debtor to be paid first on their pre-petition secured claims
  - Interim distributions of settlement proceeds to fund a litigation trust that would press claims on the estate's behalf, but in a situation where the chapter 11 case remains pending
  - Rationale – those payments are still allowed based on "significant offsetting bankruptcy-related justification" – they preserve the debtor as a going concern and/or promote the possibility of a confirmable plan that benefits all creditors

Impact of Supreme Court's *Jevic* Decision on Future Structured Dismissals of Chapter 11 Cases

- The U.S. Supreme Court Did Not Bar All Structured Dismissals, Just Non-Consensual Structured Dismissals Providing Distributions of Estate Property to Lower Priority Creditors In Violation of the Bankruptcy Code's Priority Rules
- The Court Left Open the Possibility of a Structured Dismissal Involving a Distribution That Skips Priority Creditors Where the Higher Priority Creditors Consent
- The Court Also Left Open the Propriety of a Distribution That Skips Certain Priority Creditors as Part of an Interim Settlement Distribution
  - "Gifting" settlement scenarios, where secured lender makes payment to more junior creditors of funds that would otherwise be payable to the secured lender may still be permissible if not done as part of final case dismissal

CREDIT CARD SURCHARGES

Credit Card Surcharge Litigation

- Many antitrust lawsuits targeted against Visa, Master Card, Discover and various banks commencing 2005
- Defendants included:
  - Visa Defendants [Visa U.S.A, Inc., Visa International Service Association, Visa Inc.]
  - Mastercard Defendants [MasterCard International Incorporated and MasterCard Incorporated]
  - Bank Defendants [Bank of America, Capital One, Chase, Citibank, HSBC and numerous others]

What Was It All About?

- Allegations that combination and conspiracy
  - Raised, fixed, stabilized and maintained at artificially high levels and non-competitive levels the interchange fees and merchant discount fees
  - Merchants were deprived of the benefits of free and open competition in the market for credit card network services
  - Price competition in the provision of credit card network services to merchants was restrained, suppressed and eliminated.

No Surcharge Rule

- Main Issue was the "No Surcharge Rule" which forbade merchants from charging cardholders a surcharge on their cards to reflect cost differences among various payment methods.

Settlement Agreement Approved December 13, 2013

- Visa and Master Card entered into a Settlement Agreement which was approved on December 13, 2013
- American Express Preliminary Settlement Order and Supplement Preliminary Settlement Order signed February 11, 2014 – approval denied

What This Means To The Trade Credit Grantor

- Merchants are now permitted to surcharge Credit Card Transactions:
  - Cap imposed by Credit Card Companies
- Merchants must notify customers that surcharge will be imposed
  - At least 30 day's written notice of intent to impose surcharges, specifying if at brand or product level.
  - Provide disclosure to customers that merchant imposes surcharge not greater than Cost:
    - at point of *entry* into store (not POS)
    - if online, at first page website specifying that a surcharge will be passed through for credit card payment

Credit Card Processing Fees Now Legal For The Most Part

- Since January 27, 2013, Surcharges have been allowed by Credit Card Companies even prior to settlements being finalized
- Federal Law prohibits surcharging of Debit Cards
- Various state laws exist which prohibit surcharging

Credit Card Processing Fees Still Illegal – in certain areas

- It was still Illegal to surcharge your customer with your credit card processing fees in 10 states and Puerto Rico:
- California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and, Texas.

Credit Card Surcharging

- California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, Texas
- Puerto Rico also contains a similar statute
- Similar language throughout the statutes
  - No retailer …may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, electronic or similar means

State Statutes Applicable To Consumer Or Commercial Credit

- 3 of the states with surcharge prohibition laws have adopted the Uniform Consumer Credit Code:
  - Colorado, Kansas, Maine
  - California's statute specifically uses the word "consumer"
  - Massachusetts' statute is included under "Consumer Credit Cost Disclosure"
  - Oklahoma's statute is under the title "Consumer Credit Code"
  - Texas' prohibitions regarding surcharge is specifically enforced only by the Consumer Credit Commissioner
  - Puerto Rico's statute specifically uses the word "consumer"

  Remaining states unclear as to Consumer or Commercial

Credit Card Surcharging

- California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, Oklahoma and Puerto Rico
- Permit the offering of a discount to induce payment by cash, check or other means not involving credit card IF
  - OFFERED TO ALL PROSPECTIVE BUYERS AND DISCLOSED CLEARLY AND CONSPICUOUSLY IN ACCORDANCE WITH REGULATIONS

New York Lawsuit Commenced To Challenge The Constitutionality Of Anti-surcharge Law

- *Expressions Hair Design et al v. Schneiderman, Attorney General of New York, et al.*
  - Commenced 2013 for a determination that New York State's General Business Law §518 is unconstitutional, vague and in violation of the First Amendment right to freedom of speech
  - §518 says, in part "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash."
  - Commenced in the U.S. District Court for the Southern District of New York
- Federal Judge Rakoff found the NY statute unconstitutional
  - "[I]n terms of their immediate economic consequences, surcharges and discounts are merely different labels for the same thing—a price difference between cash and credit."
  - "[T]his virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders Section 518 unconstitutional."

2nd Circuit Court Of Appeals Decision

- Circuit Court of Appeals decision on September 29, 2015
  - New York's law "does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers; it forbids charging credit-card customers an additional amount above the regular price that is not also charged to cash customers but it permits offering cash customers a discount below the regular price that is not also offered to credit-card customers".
  - New York's law is neither unconstitutional nor does it violate a merchant's freedom of speech.
- Petition to be heard by the Supreme Court of the United States (*writ of certiorari*) was granted on September 29, 2016

Scotus Decision In *Expressions Hair Design v. Schneiderman*

- Oral argument took place on January 10, 2017
  - Justice Sotomayor said she did not "see anything about speech in the statute."
- SCOTUS decided on March 29, 2017
- Opinion, delivered by Chief Justice John Roberts, stated "The question presented is whether §518 regulates merchants' speech and—if so—whether the statute violates the First Amendment. We conclude that §518 does regulate speech and remand for the Court of Appeals to determine in the first instance whether that regulation is unconstitutional."
- Opinion has not resolved the surcharge issues at all

Florida Lawsuit Commenced To Challenge The Constitutionality Of Anti-Surcharge Law

- *Pamela Jo Bondi, Attorney General of the State of Florida v Dana's Railroad Supply et al*
- Action originally commenced in 2014 by the merchants against Bondi for a determination that Florida Statute § 501.0117 is unconstitutional and seeking an injunction preventing the State of Florida from enforcing the law.
- Florida's no-surcharge law makes it a criminal offense—punishable by a fine of $500 and jail time—for any "seller or lessor in a sales or lease transaction [to] impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card."

Florida Lawsuit Commenced To Challenge The Constitutionality Of Anti-Surcharge Law

- Florida's statute expressly permits "the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers."
  - Commenced in the U.S. District Court for the Northern District of Florida
- Federal Judge Hinkle found the Florida statute to be constitutional
  - "The merchant may give a discount for paying with cash, but the merchant may not exact a surcharge for paying with a credit card. This is the law even though the difference between a cash discount and a credit-card surcharge makes no difference in the price a customer must pay when using either cash or a card; it is a matter of semantics, not economics."
  - "This statute is [not] … a First Amendment violation. … this statute is constitutional."

11th Circuit Court Of Appeals Decision

- Circuit Court of Appeals ruled on November 4, 2015
  - "Tautologically speaking, surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a "negative" discount, and a discount is a "negative" surcharge. As a result, a merchant who offers the same product at two prices—a lower price for customers paying cash and a higher price for those using credit cards—is allowed to offer a *discount* for cash while a simple slip of the tongue calling the same price difference a *surcharge* runs the risk of being fined and imprisoned"
  - "By holding out *discounts* as more equal than *surcharges*, Florida's no-surcharge law overreaches to police speech well beyond the State's constitutionally prescribed bailiwick."
  - "We, therefore, must strike down § 501.0117 as an unconstitutional abridgment of free speech"

11th Circuit Court Of Appeals Decision

- Petition to be heard by the Supreme Court of the United States (*writ of certiorari*) was filed on June 6, 2016.
- Petition was held in abeyance pending the SCOTUS decision in the *Expressions Hair case*
- Petition was denied outright on April 3, 2017

Texas Lawsuit Commenced To Challenge The Constitutionality Of Anti-Surcharge Law

- *Lynn Rowell etal v. Leslie L. Pettijohn*, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas
- Virtually identical to the *Expressions Hair* case

Texas Lawsuit Commenced To Challenge The Constitutionality Of Anti-Surcharge Law

- Commenced 2014 for a determination that declaration that TEX. FIN. CODE § 339.001, barring surcharges is unconstitutional and seeking an injunction preventing the State of Texas from enforcing the law
  - TEX. FIN. CODE § 339.001 Texas's no-surcharge law makes it unlawful for any merchant, "[i]n a sale of goods or services," to "impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment
  - Texas' "no-surcharge" law permits merchants "to extend a discount to a buyer who pays with cash instead of a credit card."
  - Commenced in the U.S. District Court for the Western District of Texas
- Federal Judge Yeakel dismissed the Complaint finding "that the Texas Anti-Surcharge law regulates only prices charged, an economic activity that is within the state's police power, and does not implicate First Amendment speech rights."
  - "the Anti-Surcharge law regulates economic conduct, not speech."

5th Circuit Court Of Appeals Decision

- Circuit Court of Appeals decision on March 2, 2016
  - The Circuit Court examined thoroughly the 2nd Circuit (*Expressions Hair*) and the 11th Circuit (*Rowell*) *cases* which were in opposition to each other
  - "Texas' law regulates conduct, not speech, and, therefore, does not implicate the First Amendment. Instead, the law ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards."
  - "Furthermore, simply speaking about the prices regulated by Texas' law does not transform it into a content-based speech restriction; the speech is merely incidental to the regulated economic conduct"
  - A plain reading of Texas' law shows it forbids a merchant from imposing an extra charge for a purchase with a credit card, and is completely silent as to any other form of pricing.

5th Circuit Court Of Appeals Decision

- The Circuit Court affirmed the District Court and held that the Texas statute did not violate the First Amendment right to freedom of speech.
- Petition to be heard by the Supreme Court of the United States (*writ of certiorari*) was filed on May 31, 2016 and was also held in abeyance pending the decision in the *Expressions Hair* case.
- On April 3, 2017, the Petition was Granted, the 11th Circuit Court of Appeals Judgment was Vacated and the case was Remanded for further consideration in light of *Expressions Hair*

SCOTUS RESOLVES THE SPLIT AMONG CIRCUITS REGARDING THE FILING OF PROOFS OF CLAIM ON STALE DEBTS

Crawford v. LVNV Funding, LLC

- Furniture Company debt became unenforceable as time barred in October, 2004
- Chapter 13 filed by debtors in February, 2008
- Proof of claim filed in the chapter 13 proceeding
- Adversary Proceeding against claimant dismissed by Bankruptcy Court
  - Ruling affirmed by District Court
  - 11th Circuit (2014) held the filing of the proof of claim **violated the FDCPA's plain language**

Gatewood V. CP Medical, LLC

- Chapter 13 filed by Debtors
- CP Medical filed a "time-barred" proof of claim
- Debtors confirmed a chapter 13 Plan and did NOT object to CP Medical's claim
- Debtors sued CP Medical for violation of the FDCPA
- Bankruptcy Court dismissed the FDCPA action holding that filing a proof of claim did not constitute actual litigation or the threat of litigation.
- 8th Circuit Bankruptcy Appellate Panel (2015) found that filing an accurate though time-barred claim was **not a false, misleading, deceptive, unfair or unconscionable debt collection practice**.

Birtchman V. LVNV Funding, LLC

- Chapter 13 filed by Birtchman
- LVNV filed a proof of claim on a debt barred by the Statute of Limitations
- District Court ruling:
  - Filing a truthful proof of claim, "even one that was beyond the statute of limitations" did not violate the FDCPA
  - Filing the claim was not "false, deceptive or misleading"
  - dismissed adversary proceeding against Midland finding that the Bankruptcy Code **allows the filing of a claim**
- Case appealed to the 7th Circuit Court of Appeals
  - District Court affirmed in August, 2016

Nelson v. Midland Credit Management, Inc.

- Chapter 13 filed by Debtor in February, 2015
- No payment on debt to Midland since November, 2006
- Objection to Claim sustained and Midland claim disallowed
- FDCPA action filed against Midland
- District Court dismissed
  - Filing an accurate and complete claim on a time-barred debt did not violate the FDCPA
- 8th Circuit (2016) affirmed and held
  - Bankruptcy process provides sufficient protection from harassment to distinguish it from filing a state court collection suit
  - Filing a claim was not a collection action but was instead a request to participate in a common fund
  - **FDCPA does not apply**

Dubois v. Atlas Acquisitions, LLC

- Chapter 13's filed by Debtors
- Proofs of claim were filed on debts past the statute of limitations
- Debtors objected to the claims and alleged the filing of the claims violated FDCPA
- Bankruptcy Court dismissed the FDCPA actions but granted the objections to claim
- Appeal was taken to the 4th Circuit Court of Appeals.
  - Decision on August 25, 2016 determined that the filing of the proofs of claims **did not violate the FDCPA**

Johnson V. Midland Funding, LLC

- Aleida Johnson filed a personal Chapter 13 petition in March, 2014.
- At that time Midland Funding, LLC was owed $1,879.71
  - The latest charge on Johnson's account was more than 10 years before Johnson's chapter 13 filing
  - Relevant – Alabama – statute of limitations to pursue that debt is 6 years
- Midland filed a proof of claim truthfully stating that the underlying debt was more than 10 years old.
- Johnson objected to the Claim
  - Midland did not respond to the objection
  - The Bankruptcy Court disallowed the claim

Johnson V. Midland Funding, LLC

- Johnson sued Midland seeking actual damages, statutory damages, attorney's fees and costs
- Allegation was that the filing by Midland of a proof of claim on a time-barred debt was a violation of the Fair Debt Collection Practices Act
- U.S. District Court dismissed the action (in conflict with *Crawford* of the same Circuit)
  - Found that the Bankruptcy Code was in conflict with the FDCPA
  - Determined that the FDCPA did not apply
- Johnson appealed to the 11th Circuit Court of Appeals

Johnson v. Midland Funding, LLC 11th Circuit Court of Appeals

- 11th Circuit ruled on May 24, 2016 and reversed the U.S. District Court
  - The Bankruptcy Code and the FDCPA can be "read together in a coherent way"
  - A debt collector knowingly filing a time-barred proof of claim is vulnerable to a claim under the FDCPA
  - Cited Alabama law "[w]hen the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable."
  - Found that "although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place."
  - But held that filing such a claim **is violative of the FDCPA**

Johnson V. Midland Funding, LLC

- Petition for rehearing was denied on August 19, 2016
- *Writ of certiorari* filed with SCOTUS on September 11, 2016
- Petition granted on October 2016
  - Issues to be argued:
    - 1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.
    - 2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.
- 11th Circuit Ruling conflicts with the 4th, 7th & 8th Circuit Rulings which found no violation of the FDCPA
- Oral Argument heard on January 17, 2017

Johnson V. Midland Funding, LLC

- Issues raised during Oral Argument
  - Did Midland Funding know it had a time-barred debt
  - Did Midland Funding have a responsibility to investigate the existence of a limitations defense
  - Creditor has a right to file a claim where there is right to payment
    - Discussion of difference between right to payment and enforceability
  - Debtor or Trustee must then object
- FDCPA concepts:
  - False, Deceptive, or misleading representation
  - Unfair or unconscionable means to collect, or attempt to collect a debt

Johnson V. Midland Funding, LLC SCOTUS Considerations

- Bankruptcy Code definition of "claim":
  - "Right to payment…whether or not such right is …fixed, contingent, … [or] disputed."
    - Even an "unenforceable" claim is nonetheless a "right to payment" hence a "claim"
- FDCPA concept of "misleading" requiring "Consideration of the legal sophistication of its audience"

Johnson V. Midland Funding, LLC SCOTUS Considerations

- FDCPA concept of "unfair" applies to asserting a claim known to be time-barred
  - These concepts work in civil actions but are not necessarily applicable in the context of a claim in the bankruptcy court
- Proof of Claim not "false, deceptive or misleading" where on its face it indicated that the limitations period had run.
- Debtor generally represented by counsel – Trustee knowledgeable about the ability to object to a claim
- Obtaining a discharge of a debt by allowing a claim may actually benefit a debtor

Johnson V. Midland Funding, LLC SCOTUS Ruling

- FDCPA considerations "have significantly diminished force in the context of a Chapter 13 bankruptcy"
- "Context of a civil suit differs significantly from … that of a Chapter 13 bankruptcy proceeding"
  - "A knowledgeable Trustee is available"
  - "Procedural bankruptcy rules more directly guide the evaluation of claims"
  - "The bankruptcy system … treats untimeliness as an affirmative defense:
  - "assertion of even a stale claim can benefit a debtor"
  - Bankruptcy Code definition of "claim":
  - "Right to payment…whether or not such right is …fixed, contingent, … [or] disputed."
    - Even an "unenforceable" claim is nonetheless a "right to payment" hence a "claim"

Johnson V. Midland Funding, LLC SCOTUS Ruling *(cont'd)*

- SCOTUS noted a clear distinction between the FDCPA (Act) and the Bankruptcy Code
  - "The Act seeks to help consumers …by preventing consumer bankruptcies in the first place."
  - "The Bankruptcy Code, by way of contrast, creates and maintains what we have called the 'delicate balance of a debtor's protections and obligations'."
  - "To find the Fair Debt Collection Practices Act applicable here would upset that 'delicate balance'."
- CONCLUSION: 11th Circuit is reversed
  - "…Filing a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act."

Johnson V. Midland Funding, LLC Dissent

- Justice Sotomayer, joined by Justices Ginsburg and Kagan
  - "The Court today wrongfully holds that a debt collector that knowingly attempts to collect a time-barred debt in bankruptcy proceedings has violated neither of these prohibitions."
  - "Professional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy proceedings to collect it, and hoping that no one notices that the debt is too old to be enforced by the courts."
  - Referring to the fact that in 2015, petitioner [Midland Funding] and its parent company entered into a consent decree with the Government prohibiting them from filing suit to collect time-barred debts and ordering them to pay $34 million in restitution said
    - "Every court to have considered this practice holds that it violates the FDCPA. There is no sound reason to depart from this conclusion."

Johnson V. Midland Funding, LLC Dissent *(cont'd)*

- Referring to the fact that these claims are subject to objections by the debtor or Trustee, the Dissenting Justices said that such objections
  - "require ordinary and unsophisticated people (and their over-worked trustees) to be on guard not only against mistaken claims but also against claims that debt collectors know will fail under law if an objection is raised."

Questions?

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Wanda Borges, the principal member of Borges & Associates, LLC, has specialized in commercial insolvency practice and commercial litigation representing corporate clients throughout the United States for over thirty years.

Wanda is admitted to practice before the courts of the State of New York and the United States District Courts for the Southern, Eastern, Northern, and Western Districts of New York, the District of Connecticut, and the Eastern District of Michigan, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court. She is a member of the American Bar Association, American Bankruptcy Institute, The Hispanic National Bar Association, The International Association of Commercial Collectors, International Women's Insolvency and Restructuring Confederation, New York Institute of Credit and the Turnaround Management Association. She is a member and Past President of the Commercial Law League of America (CLLA), previously served as Chair of CLLA's Bankruptcy Section, served for six years on the Executive Council of the Eastern Region of the CLLA, and currently serves as Chair of the Executive Council of the CLLA Creditors' Rights Section.

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Bruce S. Nathan, Partner in Lowenstein Sandler's Bankruptcy, Financial Reorganization & Creditors' Rights Group, has more than 35 years' experience in the bankruptcy and insolvency field, and is a recognized national expert on trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. Bruce has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed. Bruce also negotiates and prepares letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for the credit departments of institutional clients.

Bruce is co-chair of the Avoiding Powers Committee that is working with the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and also participated in ABI's Great Debates at their 2010 Annual Spring Meeting, arguing against repeal of the special BAPCPA protections for goods providers and commercial lessors, and was a panelist for a session sponsored by the American Bankruptcy Institute ("ABI") and co-sponsored by Georgetown University Law Center. Bruce also regularly speaks at conferences held by the National Association of Credit Management, its international affiliate, An Association of Executives in Finance, Credit and International Business ("FCIB"), Credit Research Foundation ("CRF"), and many credit groups on bankruptcy, insolvency, and creditor's rights issues; is a member of NACM's Government Affairs Committee, a regular contributor to NACM's *Business Credit,* a contributing editor of NACM's *Manual of Credit and Commercial Laws*, and co-author of *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Overhaul of U.S. Bankruptcy Law*, published by NACM; and has contributed to CRF's Journal, *The Credit and Financial Management Review*.

Bruce is recognized in the Bankruptcy & Creditor/Debtor Rights section of *Super Lawyers* (2012-2017) and in March 2011, he received the Top Hat Award, a prestigious annual award honoring extraordinary professionals in the credit industry.

Bruce is also a co-author of "Trade Creditor Remedies Manual: Trade Creditors' Rights under the UCC and the U.S Bankruptcy Code" published by the American Bankruptcy Institute ("ABI") at the end of 2011, has contributed to the *ABI Journal*, and is a former member of ABI's Board of Directors and former Co-Chair of ABI's Unsecured Trade Creditors Committee.