Supreme Court, U.S.
FILED
DEC 12 2016
OFFICE OF THE CLERK

16-757

No.

In the Supreme Court of the United States

DOMICK NELSON, PETITIONER

v.

MIDLAND CREDIT MANAGEMENT, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. VOYTAS, JR.
VOYTAS & COMPANY
1 North Taylor Avenue
St. Louis, MO 63108

ALEXANDER J. CORNWELL
BRODY & CORNWELL
1 North Taylor Avenue
St. Louis, MO 63108

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case directly implicates two circuit conflicts concerning the interaction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Bankruptcy Code.

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA.

2. Whether any such claim under the FDCPA is impliedly repealed by the Bankruptcy Code.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 6
Conclusion 8
Appendix A — Court of appeals opinion (July 11, 2016) 1a
Appendix B — Court of appeals order (Sept. 15, 2016) 7a
Appendix C — District court order (Aug. 28, 2015) 9a
Appendix D — Statutory provisions and rules 15a

TABLE OF AUTHORITIES

Page

Cases:

Buchanan v. *Northland Group, Inc.*, 776 F.3d 393 (6th Cir. 2015) 4
Crawford v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) 3, 6
Hess, In re, 404 B.R. 747 (Bankr. S.D.N.Y. 2009) 4
Johnson v. *Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016) 6
Kaymark v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) 2
McMahon v. *LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014) 4
Simmons v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010) 5

Page

Statutes and rules:

11 U.S.C. 101(5)(A) 3
11 U.S.C. 501(a) 3
11 U.S.C. 502(a) 3
11 U.S.C. 502(b)(1) 3
11 U.S.C. 541(a)(1) 3
11 U.S.C. 558 3
11 U.S.C. 704(a)(5) 3
11 U.S.C. 1302(b)(1) 3
15 U.S.C. 1692(b) 2
15 U.S.C. 1692(e) 2
15 U.S.C. 1692e 2
15 U.S.C. 1692e(10) 2
15 U.S.C. 1692e(2)(A) 2
15 U.S.C. 1692k 2
28 U.S.C. 1254(1) 1
Fed. R. Bankr. P. 3001 3
Fed. R. Bankr. P. 3001(f) 3
Fed. R. Civ. P. 12(b)(6) 7

In the Supreme Court of the United States

No.

DOMICK NELSON, PETITIONER

v.

MIDLAND CREDIT MANAGEMENT, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Domick Nelson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-6a) is reported at 828 F.3d 749. The opinion of the district court (App., *infra,* 9a-14a) is unreported but available at 2015 WL 5093437.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2016. A petition for rehearing was denied on September 15, 2016 (App., *infra,* 7a-8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, the Bankruptcy Code, and the Bankruptcy Rules are reproduced in the appendix to this petition (App., *infra*, 15a-25a).

STATEMENT

1. a. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e). In enacting the FDCPA, Congress specifically determined that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. 1692(b).

Among a broad range of prohibitions, the FDCPA forbids the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. That section further enumerates a non-exhaustive list of prohibited practices, including making false representations of "the character, amount, or legal status of any debt," and "using any false or deceptive means to collect or attempt to collect any debt." 15 U.S.C. 1692e(2)(A), 1692e(10). The Act separately prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. "[A]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes." *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 172 (3d Cir. 2015).

Congress authorized a private right of action to enforce the FDCPA's prohibitions. 15 U.S.C. 1692k.

b. Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Creditors who wish to recover from the estate "may file a proof of claim" (11 U.S.C. 501(a))—"a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001(a). The Code defines a "claim" as a "right to payment, whether or not such right is * * * fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. 101(5)(A). The filing of a proof of claim is "prima facie" evidence of its validity. Fed. R. Bankr. P. 3001(f).

A proof of claim is automatically "allowed" unless a party in interest objects and shows that "such claim is unenforceable against the debtor * * * under any agreement or applicable law." 11 U.S.C. 502(a), (b)(1). Congress specifically included "statutes of limitation" as one means of proving unenforceability (11 U.S.C. 558), and tasked bankruptcy trustees with "examin[ing] proofs of claims and object[ing] to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1) (imposing the same duty on Chapter 13 trustees). While debtors are often represented by lawyers, not all debtors are represented, and the representation does not always extend to examining proofs of claim or filing objections. See, *e.g.*, *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 740 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016) (Wood, C.J., dissenting) (citing statistics).

2. "A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256 (11th Cir. 2014). "Absent an objection from either the Chapter 13 debtor or the

trustee, the time-barred claim is automatically allowed against the debtor"; "[a]s a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259. "Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims." *Id.* at 1261. And even when a proper objection is lodged, those objections "consume[] energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Ibid.*

Debt buyers obtain debts at a fraction of their face value. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1022 (7th Cir. 2014) (FTC study showing "debt buyers paid on average 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"); *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 395 (6th Cir. 2015) ("LVNV buys 'uncollectable' debts at a discount—the older the debts, the greater the discount"). Due to this significant margin, debt collectors can generate a profit even if the majority of their time-barred claims are properly rejected as baseless. "[T]he phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system." *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009).

3. Respondent is a substantial part of this trend: its conduct here was part of a broader scheme of submitting knowingly time-barred proofs of claim, despite lacking any basis for defending the claim once anyone objected.

After petitioner sought protection in Chapter 13 bankruptcy, respondent filed a proof of claim seeking $751.87.

App., *infra*, 2a. The claim on its face was barred by Missouri's statute of limitations: it had been obtained from Retail Lane Bryant, which recorded the last transaction on November 12, 2006, nearly a decade earlier. C.A. Addendum of Appellant (Add.) 15.

Petitioner objected to this claim, and it was disallowed. App., *infra*, 2a.; Add. 20. Petitioner then sought relief under the FDCPA, alleging that respondent's attempt to collect knowingly time-barred debts violated 15 U.S.C. 1692e and 1692f as an "unfair," "unconscionable," "false," "deceptive," and "misleading" practice. App., *infra*, 10a; Add. 5-6.

4. a. The district court dismissed petitioner's complaint (App., *infra*, 9a-14a), and the Eighth Circuit affirmed (*id.* at 2a-6a). According to the court of appeals, respondent filed an "accurate and complete" proof of claim, despite seeking relief on patently time-barred debt. *Id.* at 6a. It reasoned that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA": "Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by 'trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims.'" *Id.* at 5a. The court thus found "'no need to protect debtors who are already under the protection of the bankruptcy court,'" and "'no need to supplement the remedies afforded by bankruptcy itself.'" *Id.* at 5a-6a (quoting *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)).

The court acknowledged that respondent's practice "burden[s]" debtors, but insisted the Code's claims-process was *less* "burdensome" than ordinary litigation. *Id.* at 5a. The court likewise recognized that respondent's scheme inflicts harm, but still *less* harm than collection lawsuits: "Because a proof of claim does not expand the

pool of available funds in bankruptcy, debtors have less at stake than a collection defendant." *Ibid.* The court thus refused to "follow the Eleventh Circuit," and "reject[ed] extending the FDCPA to time-barred proofs of claim." *Id.* at 4a, 6a.

b. Petitioner filed a petition for rehearing en banc, which was denied without dissent. *Id.* at 7a-8a.

REASONS FOR GRANTING THE PETITION

This case raises the same merits questions as *Midland Funding, LLC* v. *Johnson*, cert. granted, No. 16-348 (oral argument scheduled for Jan. 17, 2016). Cf. App., *infra*, 4a-5a (declining to follow the Eleventh Circuit's holdings in *Johnson* v. *Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), and *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014)). If the Court concludes that the debt collector's conduct in *Midland* violates the FDCPA, then respondent's conduct here also violates the FDPCA, and the Eighth Circuit should be reversed. The Court should accordingly hold this petition pending its decision in *Midland* and then dispose of the petition as appropriate in light of that decision.

If the Court for any reason fails to resolve these questions in *Midland*, however, this case is an ideal vehicle for deciding the questions.[1] The material facts here are cleanly presented and undisputed; they represent the precise fact pattern that has divided courts nationwide. Petitioner's complaint directly alleges that respondent acted with knowledge that the claims were time-barred, see

[1] The pending petition in *Owens* v. *LVNV Funding, LLC*, No. 16-315 (filed Aug. 26, 2016), would also serve as a suitable vehicle. Although the *Owens* petition did not raise the implied-repeal question, that issue is factually presented, was argued and preserved below, and would be properly before the Court as an alternative ground supporting affirmance.

Add. 5 ("At the time it filed its proof of claim, Defendant also knew that the alleged debt was time-barred."), and his case was dismissed under Fed. R. Civ. P. 12(b)(6). The outcome thus turns on two pure questions of law (as does *Midland*): whether filing a knowingly time-barred proof of claim violates the FDCPA, and whether the Bankruptcy Code impliedly repeals the FDCPA in this context.[2]

This case is also a better vehicle than *Dubois* v. *Atlas Acquisitions, LLC*, petition for cert. pending, No. 16-707 (filed Nov. 23, 2016). Unlike *Midland* and this case, *Dubois* has highly unusual facts: the proofs of claim expressly disclosed that they were likely time-barred. *Dubois*, C.A. Rec. 55, 140 ("This proof of claim is being filed pursuant to 11 USC Secs. 101(5), 501(a) and 502(b) as said claim may be outside of the statute of limitations."); see also *Dubois*, Pet. App. 24a (Diaz, J., dissenting) (noting this language). This renders that case unsuitable for deciding the common questions arising in courts nationwide (where the proofs of claim are silent on timeliness).

Moreover, as the *Dubois* petition recognizes (at 6-7), the respondent in that case asserted other "predicate" issues that could block the Court from reaching the questions presented. There are no such "predicate" questions here.

---

[2] The Eighth Circuit's reasoning blended elements of each question presented—suggesting, at times, that the FDCPA was not violated at all, and suggesting, at other times, that the Code displaced the FDCPA in this setting. See, *e.g.*, App., *infra*, 4a-5a (declining to follow the Eleventh Circuit's "holding that the Bankruptcy Code does not preempt the FDCPA," and concluding that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA"). To the extent the court of appeals did not decide the implied-repeal question, that issue was squarely argued below, and would again provide an alternative ground for affirmance.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Midland Funding, LLC v. Johnson*, No. 16-348, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

RICHARD A. VOYTAS, JR.
VOYTAS & COMPANY
1 North Taylor Avenue
St. Louis, MO 63108

ALEXANDER J. CORNWELL
BRODY & CORNWELL
1 North Taylor Avenue
St. Louis, MO 63108

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

DECEMBER 2016