AMERICAN BANKRUPTCY INSTITUTE

2017 Central States Bankruptcy Workshop

Supreme Court Round-Up

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Czyzewski v. Jevic Holding Corp.:

Limiting Non-Consensual Structured Dismissals or Rethinking Contemporary Bankruptcy Practice?

On March 22, 2017, the United States Supreme Court issued the long-awaited decision in *Czyzewski v. Jevic Holding Corp.* [1] The Court granted certiorari to consider the question of "whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme."[2] The question ultimately decided was narrower: "whether a bankruptcy court has the legal power to order this priority-skipping kind of distribution scheme in connection with a Chapter 11 *dismissal*."[3] Unsurprisingly, the Court answered that question with a firm "no."[4] While the holding is straightforward, the implications of *Jevic* may be significant. [5]

Background[6]

In re Jevic Holding Corp. involved a trucking company acquired by a private equity firm ("Sun") in a leveraged buyout financed by a group of lenders led by CIT Group that ultimately failed. The company ceased operating, terminated all of its employees, and filed a chapter 11 case in 2008. By 2012, most of the assets of the Debtor had been liquidated and distributed to its secured creditors. The only remaining assets were $1.7 million in cash (subject to a lien in favor of Sun) and a fraudulent conveyance suit brought by the Debtor's Creditors Committee against

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[1] 137 S. Ct. 973 (2017) .
[2] *Id.*at 987 (Thomas, J., dissenting).
[3] *Id.* at 978 (emphasis in original).
[4] *Id,*
[5] Special thanks to Professor Nicholas L. Georgakopoulos, The Harold R. Woodard Professor of Law, Indiana University Robert H. McKinney School of Law, for sharing his ideas on the impact of the *Jevic* decision.
[6] This section was part of the materials presented at the 2016 National CLE Conference prepared by Jay Jaffe and Kayla Britton.

Sun and CIT arising out of the leveraged buyout transaction. Off to the side, a group of the Debtor's drivers filed a class action against the Debtor and Sun alleging violations of federal and state Worker Adjustment and Retraining Notification (WARN) Acts. The Committee, CIT, Sun, the Drivers and the Debtor attempted to negotiate a settlement of the fraudulent conveyance suit. A settlement was reached that excluded the Drivers containing the following terms: (a) releases of claims were exchanged by and among the parties to the settlement, (b) CIT agreed to pay $2 million into an account earmarked to pay the Debtor's and Committee's legal fees and other administrative expenses, (c) Sun assigned its lien on the $1.7 million to a trust, which would pay tax and administrative creditors first, then general unsecured creditors on a pro rata basis, and (d) the chapter 11 case would be dismissed. The settlement thus contemplated a structured dismissal, which wound up the bankruptcy with the settlement conditions attached.

The Drivers were left out because their class action against Sun continued to pend. Sun declined to fund a settlement that included the Drivers unless the Drivers released their claims against Sun; Sun refused to fund continued litigation against it. For the same reason, Sun refused to go forward with a settlement that involved a conversion to a chapter 7 case. If the Drivers' claims against the Debtor were determined to be valid, at least a portion of the claims would have priority under § 507(a)(4) that would be of higher priority than the tax claims and unsecured creditor claims to be paid out of the trust under the proposed settlement. The Drivers thus opposed the proposed settlement, including the structured dismissal element, primarily because the proposed distribution of property of the estate violated the priority distribution rules under § 507 of the Bankruptcy Code.

The bankruptcy court found that the absolute priority rule applies to chapter 11 plans, but does not necessarily apply to settlements. The bankruptcy court further found that in the absence

of the settlement, there was no realistic prospect of a meaningful distribution to anyone but the secured creditors and that there was no prospect of a confirmable chapter 11 plan of reorganization or liquidation. Finally, the bankruptcy court found that a conversion to chapter 7 would not have benefitted any party because the chapter 7 trustee would not have had sufficient funds to pursue the fraudulent conveyance litigation and the secured creditors had stated unequivocally and credibly that they would not do the settlement in a chapter 7.

On appeal, the Third Circuit found that dismissal "for cause" was appropriate under § 1112 of the Bankruptcy Code, and that § 349 of the Bankruptcy Code authorizes the bankruptcy court to alter the ordinary effect of dismissal (reinstating the prepetition state of affairs by re-vesting property in the debtor and vacating orders and judgments of the bankruptcy court). The court found that the Code forbids structured dismissals when used to circumvent the plan confirmation process or conversion to chapter 7. Having found that there was no prospect of a confirmable plan and that conversion to chapter 7 was a "bridge to nowhere," the bankruptcy court had the discretion to order such a disposition.

The Third Circuit next turned its attention to whether a structured dismissal could effect a violation of the absolute priority rule, and found that a) in the "rare case" it may, and b) that this case was one of those "rare cases." The court examined other cases where settlements provided for distributions in violation of the absolute priority rule, and found no basis for the application of the absolute priority rule to settlements, as opposed to chapter 11 plans. Although compliance with code priorities will usually be determinative of whether a proposed settlement is fair and equitable under Bankruptcy Rule 9019, it is not dispositive. Settlements that skip objecting creditors should be examined closely and deviation permitted only if justified by "specific and

credible grounds." The case before it was a "close call" but ultimately, the settlement and structured dismissal aspect was the "least bad alternative" for the resolution of the case.

SCOTUS Decision

The Supreme Court did not agree. The Supreme Court could not find sufficient cause to disregard the priority scheme: "[T]he word 'cause' is too weak a reed upon which to rest so weighty a power."[7] The Supreme Court concluded that a bankruptcy court does not have the power to approve a structured dismissal that does not follow statutory priority rules without consent of all affected parties.

The Court's rule-based, narrowly tailored interpretation of the term "cause" has the potential to have far-reaching impact. One of the trademarks of bankruptcy practice is the courts' general flexibility in resolving disputes, including a heavy reliance on its equitable powers under Section 105 of the Bankruptcy Code. In other words, bankruptcy courts will often grant the relief that is the best result under bad circumstances. *Jevic* may cause bankruptcy courts to adopt a more limited view of whether it has the requisite "cause" to grant requested relief in violation of the priority rules. The *Jevic* court suggested that sufficient cause may include: (i) preserving the debtor as a going concern; (ii) making the disfavored creditors better off; (iii) promoting the possibility of a confirmable plan; (iv) helping to restore the *status quo ante*; and (v) protecting reliance interests.

The Court did not, however, prohibit all distributions in violation of the priority rules. The opinion differentiates the result in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007)

[7] *Id.* at 985.

because "in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve." Again, however, this *dicta* suggests that *Jevic*'s reach will extend beyond structured dismissals. The U.S. Bankruptcy Court for the Eastern District of Tennessee recently issued an order denying approval of a settlement because the debtor "failed to prove that disregard of the priority scheme will promote a 'significant Code-related objective."[8] The Court noted, "In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only 'fair and equitable' based on the factors to be considered by the Sixth Circuit . . . but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective."[9]

The *Jevic* decision also addressed first-day relief that may be approved despite its violation of priority rules:

> Courts, for example, have approved "first-day" wage orders that allow payment of employees' prepetition wages, 'critical vendor' orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their prepetition claims… In doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off.[10]

This statement may be viewed as the Supreme Court's tacit approval for such requests, rendering the *Jevic* decision a worthy citation in first day motions requesting such relief. Conversely, it could be argued that this suggests a higher, often less pragmatic approach to first

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[8] *In re William Harry Fryar*, No. 1:16-bk-13559-SDR (Bankr. E.D. Tenn. April 25, 2017) at *11.

[9] *Id.* at *12.

[10] *Jevic*, 137 S. Ct. at 985.

day relief. Debtors may be required not just to establish that such relief is warranted, but that the relief is necessary to reorganization or that creditors' position will be improved. Arguably, that is the standard debtors strive to attain in all requests for relief, but consider employee wage motions in liquidation cases. Is payment of prepetition wages at the outset of a case necessary to a reorganization (clearly not in a liquidation), and do other creditors benefit from payment of those amounts when liquidity may be required to fund a 363 sale process or otherwise to obtain higher value for the estate?

The key takeaways of *Jevic* are that (i) non-consensual structured dismissals are not permissible, and (ii) debtors would be well-advised to demonstrate how any requested relief in violation of the priority rules promotes a "significant Code-related objective." It remains to be seen how far the implications of *Jevic* extend.

Please Release Me—A Case for th*e Millennium*

INTRODUCTION

Overview. The *Stern v. Marshall* issue will not go away (at least until bankruptcy judges are Article III judges or the pragmatists win over the purists). Plan Confirmation is not safe as a recent Delaware District Court case explains. *In re Millennium Labs Holdings II, LLC, et.al,* ____ F. Supp. 3d _____, 2017 WL 1032992 (D.Del. 2017).

FACTS

(a) *Millennium* provided laboratory and diagnostic services and was reimbursed by Medicaid. The U.S. Department of Justice ("DOJ") began an investigation into inappropriate reimbursements to *Millennium*.

(b) *Millennium* files bankruptcy and proposes a plan in which non-debtor equity holders contribute $325 million. Of that, $256 million goes to the DOJ to settle its claims, $50 million to other lenders, and $19 million for working capital. As part of the Plan, the non-debtor equity holders are released from third party claims against them related to *Millennium*.

(c) The *Millennium's* secured lenders (the "Lenders") had a pending adversary proceeding against the non-debtor equity holders for fraud, RICO, and other claims based on the inappropriate Medicaid reimbursements.

(d) Lenders filed an objection to the non-debtor equity holder third party release contained in the Plan.

BANKRUPTCY COURT PLAN CONFIRMATION

(a) Among the myriad objections the Lenders raised a *Stern* issue asserting that the bankruptcy court has neither "arising in" nor "related to" jurisdiction to approve third party releases, especially so with no opt-out provision.

(b) The debtor responded that *Stern* left intact a bankruptcy court's jurisdiction to approve third party release. The debtor cited cases holding that *Stern* did not impact a bankruptcy court's jurisdiction because mere plan approval is not an adjudication of all the disputes the plan deals with citing to *In re Charles Street African Methodist Episcopal Church of Boston,* 499 B.R. 66, 99 (Bankr. D.Mass. 2013).

(c) The bankruptcy held a hearing and ruled that it had related to jurisdiction and could approve the third party releases and found the proposed releases fair and necessary to the reorganization.

(d) The Lenders appealed the same day that the confirmation order was entered.

THE DISTRICT COURT DECISION

(a) The district court agreed that *Stern* did not deprive the bankruptcy court of subject matter jurisdiction. It went further though stating that is not the end of the inquiry. The bankruptcy court must have constitutional authority as well.

(b) The district determined that the bankruptcy court did not have the opportunity to explain its reasoning on that issue and remanded the case for further consideration by the bankruptcy court as to whether it had constitutional authority.

(c) The district court, however, did not stop there. It provided some guidance for that analysis.

THE DISTRICT COURT GUIDANCE

(a) It first stated that there is no dispute that the Lenders' claims against the released parties are non-bankruptcy claims, between non-debtors, not from the bankruptcy, that do not have to be resolved as a part of the bankruptcy.

(b) Therefore *Stern* entitles the Lenders to Article III adjudication and that no final order can be issued by an Article I court, barring consent, which is not present in this case.

(c) Furthermore, the district court rejected the debtor's contention that a plan confirmation does not implicate *Stern* because it is not a final adjudication of the third party claims.

(d) The district court rejected the form over substance argument. Because the bankruptcy could not have adjudicated the third party causes of action outside of a proof of claim process, it cannot do indirectly what it cannot do directly. The form whether adversary proceeding, contested matter, or plan confirmation does not matter.

(e) The district court also rejected the debtor's contention that the district court's review of the issue on appeal mooted the issue—that an Article III court will decide it.

(f) Mere ratification by the district court of the entry of an underlying unconstitutional order merely ratifies the extinguishment of the undisputed state law third party claims without adjudication by an Article III court.

(g) On remand, the bankruptcy court is to clarify whether it has constitutional authority to approve the releases. If it concludes it does not, then it should submit proposed findings of fact and conclusions of law through the confirmation order or strike the releases from the plan.

(h) On remand the bankruptcy court gave the parties 45 days to submit initial briefs, 21days for reply briefs, and the option of submitting proposed findings of fact and conclusions of law.

WHAT MIGHT IT MEAN?

(a) The case could be an aberration. It is a single district court ruling on a narrow issue of law. The actual holding was merely a remand for clarification.

(b) Third party releases could face more challenges. The leverage may have shifted.

(c) Forum shopping could be more important, say Massachusetts for example, as cited above versus Delaware if you need a third party release.

(d) More *Stern* challenges to plan confirmation? The issue was raised *In re One2One Communications, LLC*, 805 F.3d 428 (3rd Cir. 2015), but the circuit court wisely avoided the constitutional issue.

(e) *Stern*, like a zombie, simply refuses to die.

The Looming Issues
Cert Petitions Granted and Pending

I. Introduction

A. Since last summer, there have been a number of cert petitions filed in bankruptcy cases. Two cert petitions have been granted and several others are likely to be granted.

B. These petitions involve a variety of issues from the appropriate standard of review for determining non-statutory insider status to the relationship between the Bankruptcy Code and the Medicare Act.

II. The Grants

A. *U.S. Bank National Association v. The Village of Lakeridge*, No. 15-1509

1. Facts and Procedural History

a. Single asset real estate bankruptcy case involving just two creditors, the Petitioner and Robert Rabkin.

b. Rabkin purchased a $2.76 million insider claim from his girlfriend (a member of the Debtor and its corporate designee) for $5,000 just a few days before the Debtor's disclosure statement hearing.

c. Rabkin provided the single vote to confirm the reorganization plan over Petitioner's objection.

d. Bankruptcy Court

i. Held that Rabkin acquired the same status as an insider when he bought the claim and did not confirm the plan.

ii. Held that Rabkin was not a non-statutory insider for the purposes of § 1129(a)(10).

iii. The Debtor appealed and the Petitioner cross-appealed. Petitioner argued that the bankruptcy court applied the wrong standard of review to the non-statutory insider question and erroneously concluded that Rabkin was not a non-statutory insider.

e. 9th Circuit BAP—Reversed

f. 9th Circuit Published Opinion

i. Held that the general law of assignment did not apply to the sale of insider claims.

ii. Applied a clearly erroneous standard of review to the question of whether Rabkin was a non-statutory insider.

iii. Declined to apply an arm's-length analysis to whether Rabkin was a non-statutory insider.

2. The petition presented three questions:

a. Whether an assignee of an insider acquires the original claimant's insider status for purposes of the cramdown plan vote.

b. What the appropriate standard of review for determining non-statutory insider status is.

c. Whether the proper test for determining non-statutory insider status is an "arm's length" analysis or "functional equivalent" analysis.

3. On March 27, 2017, the Supreme Court granted cert, but limited it to the second question presented.

B. *Merit Management Group, LP v. FTI Consulting, Inc.*, No. 16-784

1. Case involving the avoidance of a transfer. It implicates 11 U.S.C. § 546(e) which prohibits a trustee from avoiding a transfer "by or to (or for the benefit of)" a financial institution.

2. Facts and Procedural History

a. Valley View Downs purchased Bedford Downs racetrack for $55 million. Petitioner had a 30% interest in Bedford Downs. Respondent is a successor in interest to Valley View.

b. Purchase was funded by Credit Suisse. Credit Suisse paid the purchase price to Citizens Bank, which served as the escrow agent. After the transaction closed, Citizens disbursed Petitioner's portion of the proceeds ($16.5 million) in two installments in 2007 and 2010.

c. Valley View hit hard times and filed for bankruptcy in Delaware. Its reorganization plan was confirmed and a litigation trust was created. Respondent is the trustee.

d. Respondent filed suit in the Northern District of Illinois seeking to avoid the transfer to Petitioner.

e. Petitioner successfully moved for judgment on the pleadings and the Respondent appealed.

f. 7th Circuit Decision

i. Reversed.

ii. While it conceded that the transfer here was between financial institutions, the Seventh Circuit said that the economic substance of the transaction was what mattered.

iii. Acknowledged that it was splitting from five other circuit courts, but said that if Congress had intended Section 546(e) to be a safe harbor where financial institutions were merely a conduit of a transaction, Congress could have easily said that.

g. Cert Petition presented one question:

i. Does Section 546(e)'s safe-harbor provision bar the avoidance of a transfer by or to a financial institution where the benefit and detriment of the transfer affects companies that are not financial institutions?

h. Cert was granted on May 1, 2017.

i. Another cert petition raises the same issue though posed a little differently. That case is *Deutsche Bank Trust Company Americas v. Robert R.* McCormick *Foundation*, 16-317 (otherwise known as the *In re: Tribune Company Fraudulent Conveyance Litigation*). That petition poses the question this way:

i. Whether a fraudulent transfer is exempt from avoidance under 11 U.S.C. § 546(e) when a financial institution acts as a mere conduit for fraudulently transferred property.

III. Pending Cert Petitions

A. *Lamar, Archer & Cofrin, LLP v. R. Scott Appling*, No. 16-1215

1. Ordinarily, a debtor cannot discharge any debt incurred by fraud, but a debtor can discharge a debt incurred by a false statement respecting his or her financial condition unless that statement is in writing. 11 U.S.C. § 523(a)(2).

2. Facts and Procedural History

a. Appling hired Petitioner, a law firm, to represent him in litigation. Appling was unable to keep current on his legal bills and the Petitioner threatened to cancel its representation.

b. Appling assured his attorneys—***orally***—that he was expecting a $100,000 tax refund. The firm continued its representation.

c. Appling did get a more modest refund of $60,000 but did not pay the firm.

d. Appling met with the firm again and told it that he had not yet received the refund.

e. Petitioner obtained judgment in state court for owing legal fees. Appling and his wife filed for bankruptcy.

3. Bankruptcy Court

a. Held that because Appling made fraudulent statements on which the firm justifiably relied, Appling's debt was non-dischargeable.

4. District Court affirmed.

5. 11th Circuit reversed.

a. Framed the question as the following: Can a statement about a single asset be a "statement respecting the debtor's . . . financial condition" pursuant to 11 U.S.C. § 523(a)(2)?

b. Acknowledged that courts have been split on this.

c. Held: "Financial condition" likely means the sum of all assets and liabilities but thought that a "statement *respecting* the debtor's" financial condition was broader than that and included a statement about a single asset. Accordingly, Appling's debt to the Petitioner ***was dischargeable***.

d. Rejected arguments that this would create a "giant fraud loophole" and reward dishonest debtors.

6. Question for cert: What constitutes a "statement respecting the debtor's . . . financial condition," under Section 523(a)(2)?

B. *Florida Department of Revenue v. Irain Lazaro Gonzalez*, No. 16-1013

1. This case involves the interrelation between the automatic stay in 11 U.S.C. § 362(a)(6) and the exception to automatic stay for domestic support obligation payments in 11 U.S.C. § 362(b)(2)(C).

2. Facts and Procedural History

a. Gonzalez filed for Chapter 13 bankruptcy. He had a domestic support obligation (DSO). His plan was confirmed. Subsequently, the Florida Department of Revenue (DOR) attempted to intercept a work-related reimbursement in order to satisfy his DSO.

b. The Bankruptcy Court found the DOR in contempt for violating the Court's confirmation order and awarded Gonzalez attorney's fees.

3. District Court affirmed.

4. 11th Circuit affirmed.

   a. DOR argued that lower courts failed to appreciate a key change Congress made to the Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

   b. DOR argued that it was permitted to garnish the reimbursement because it was a DSO.

      c. The 11th Circuit said the issue was how the automatic stay and the DSO exception interacted with Section 1327(a), which states that the "provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."

   d. In short, the question presented was whether the exception to the automatic stay for DSOs applies even after plan confirmation.

   e. Held: No, the exception does not apply. If Congress had intended for DSO collection efforts to be exempt from Section 1327's binding effect it could have said so by adding the phrase "non-Domestic Support Obligation" to the statutory language.

      i. DOR confused post-petition and post-confirmation processes. Congress was attempting to fix the former with BAPCPA, not the latter.

      ii. "Simply put, the post-BAPCPA code now allows a DSO creditor to collect after the imposition of the automatic stay, but that right ends after confirmation of the plan."

5. Cert petition: Florida framed it more in terms of the mandated collection actions it must undertake under the Social Security Act.

   a. According to Florida, Title IV, Part D of the Social Security Act requires certain state agencies to notify federal agencies, when a parent owes child support, and this notice triggers certain mandated collection actions.

   b. Question: Whether agencies mandated to collect child support under Title IV-D can continue to do so after a debtor's Chapter 13 plan is confirmed.

C. *Bayou Shores SNF, LLC v. Florida Agency for Health Care Administration*, No. 16-967

1. The Medicare Act states that "[n]o action against the United States, the [Secretary of Health and Human Services,] or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h).

2. Section 1334 of Title 28 gives district courts exclusive jurisdiction over bankruptcy cases.

3. The questions in this case are whether the Medicare Act bars a district court and/or bankruptcy court from exercising jurisdiction over a claim in bankruptcy that arises under the Medicare Act and whether a debtor has to exhaust administrative remedies prior to pursuing bankruptcy relief.

4. Facts and Procedural History

    a. Section 405's History:

        i. Section 405 was enacted in 1939 as part of the Social Security Act. When originally drafted, it barred actions brought under Section 41 of Title 28 to recover on a claim arising under the Social Security Act. In 1939, Section 41 had all of U.S. District Courts' grants of jurisdiction, including bankruptcy matters.

        ii. Later, Congress revised Section 41 and moved some jurisdictional grants to other places in the code. Section 405 of the Medicare Act was not revised. It continued to refer to the now-defunct 28 U.S.C. § 41.

        iii. Congress subsequently amended Section 405 to its current reading. It did not include Section 1334 as one of those sections included in Section 405.

    b. Bayou Shores is a skilled nursing facility. In 2014, the Agency for Healthcare Administration of the State of Florida (AHCA) recommended to HHS that Bayou Shores' Medicaid and Medicare provider agreements be terminated.

    c. Bayou Shores sought administrative review but also filed Chapter 11. It invoked the automatic stay protection over the provider agreements.

    d. Meanwhile, AHCA informed Bayou Shores' patients that their Medicaid and Medicare benefits were going to be terminated.

    e. Bayou Shores sought emergency relief from the bankruptcy court. The bankruptcy court held that the provider agreements were property of the

estate and enjoined AHCA from removing patients and terminating benefits.

f. Eventually, Bayou Shores filed a plan of reorganization which the bankruptcy court confirmed. HHS and AHCA argued that 42 U.S.C § 405(h) stripped the bankruptcy court of jurisdiction.

5. Bankruptcy Court

   a. The plain language of Section 405(h) does not mention Section 1334, therefore concluded it had jurisdiction. Court confirmed the plan and allowed Bayou Shores to assume the provider agreements under 11 U.S.C. § 365(b)(1)(C).

6. District Court

   a. Reversed.

   b. Agreed with HHS and AHCA's jurisdictional argument.

   c. Reversed the assumption of Bayou Shores' provider agreements.

7. 11th Circuit affirmed.

   a. Acknowledged a split among the courts and aligned itself with the Third, Seventh, and Eighth Circuits.

   b. Held that Section 405(h) bars bankruptcy jurisdiction over claims that arise under the Medicare Act.

   c. Additionally, held that Bayou Shores had failed to exhaust its administrative remedies before pursuing bankruptcy.

8. Cert Petition:

   a. Does Section 405(h) bar a district court from exercising bankruptcy jurisdiction over claims arising under the Medicare Act?

   b. Does Section 405(h) require a debtor to exhaust administrative remedies before pursuing relief available to debtors under the Bankruptcy Code?

IN THE SUPREME COURT OF THE UNITED STATES

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MIDLAND FUNDING, LLC, :

Petitioner : No. 16-348

v. :

ALEIDA JOHNSON, :

Respondent. :

- x

Washington, D.C.

Tuesday, January 17, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf of the Petitioner.

DANIEL L. GEYSER, ESQ., Dallas, Tex.; on behalf of the Respondent.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 16-348, Midland Funding v. Johnson.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The Bankruptcy Code sets up a process for evaluating claims that are subject to potential limitations defenses. Under that process, a creditor seeking to collect on a debt files a proof of claim. For certain types of consumer debt, the creditor also includes information to enable the trustee and other parties in interest to assess the claim's timeliness and where appropriate to object. A creditor is not required to go further and to certify that there is no valid limitations defense to its own claim. If that is exactly what Respondent and the government are asking this Court to do, under the guise of interpreting the Fair Debt Collection Practices Act. There is nothing --

JUSTICE GINSBURG: Under the Fair Debt Collection Practices Act, suppose there were a suit

brought in court to collect on a debt that is time-barred. Would that violate the Fair Credit law if you sued in court on a debt that was time-barred?

MR. SHANMUGAM: Justice Ginsburg, our view, perhaps not surprisingly, is no. Our view is that there would be nothing misleading or unfair about the suit in that instance.

But this Court need not address that issue in order to resolve the question presented here, and indeed, the courts of appeals that have accepted our view have largely assumed that the filing of a suit in state court presents different considerations from the filing of a proof of claim in bankruptcy. And that is for the simple reason that there are distinctive characteristics about the operation of the bankruptcy system.

First, and perhaps most importantly, the bankruptcy system defines the term "claim" quite broadly to include any circumstance in which there is a right to payment. And as this Court held in Butner, whether or not there is a right to payment is defined under state law, and Alabama law is clear that the running of a limitations period does not extinguish the right; the right remains. And so, for instance, if the debtor takes some action to make repayment, the right springs

back into life, indeed, the right never disappears in the first place, but the right, once again, becomes judicially enforceable.

JUSTICE KENNEDY: Are there -- are there any circumstances, just as a practical matter, where the trustee decides that the trustee is going to pay the time-barred debt, it's obviously prejudicial to the other creditors. Are there any -- I was -- I was just trying to think of that. I -- I can't think of any instance in which a trustee would want to do that. I was thinking suppose the debtor wanted to continue a business relation with the -- with -- with the creditor whose debt is time-barred, and -- and as for -- but I -- I just can't think of any instance. But perhaps --

MR. SHANMUGAM: No, and -- and -- and Justice Kennedy, I can't think of any instance either, and I think that that's precisely because the trustee has the statutory duty to object, to preserve the assets of the estate, and to do so for the creditors. And, again, that is a critical feature of the bankruptcy system.

JUSTICE SOTOMAYOR: I'm sorry. I'm having a great deal of difficulty with this business model. Completely. You buy old, old debts that you know for certainty are not within any statute of limitations.

You buy them and you call up creditors and you say to them, you don't have to pay me. But out of the goodness of your heart, you should? Or do you just call them up and say, you owe me money, and you hope that they'll pay you.

And is it the same thing in bankruptcy court? You filed a claim and you hope the trustee doesn't see that it's out of time? And apparently, you collect on millions of dollars of these debts. So is that what you do?

MR. SHANMUGAM: So, Justice Sotomayor, I do not think that that is a valid understanding of our business model, and let me explain why.

First, this debt was not time-barred at the time it was purchased. And indeed, Midland, my client, makes every effort not to purchase time-barred debt. Now, of course, they're not always correct in their assessments, and debt that is not time-barred at the time of purchase can come --

JUSTICE SOTOMAYOR: Did you have a good-faith basis in this case to believe that the debt was not time-barred --

MR. SHANMUGAM: Well --

JUSTICE SOTOMAYOR: -- when you filed this claim? Forget about some of the others.

MR. SHANMUGAM: Just to be clear, there is actually no allegation in this case that we knew that there was a valid limitations defense. If you take a look at the complaint in this case, and if you take a look at page 25 of the Joint Appendix in particular, all that the complaint alleges is that we were aware of the very facts that we disclosed in the proof of claim. Facts that, to be sure, indicated the existence of a potential limitations defense. Because, after all --

JUSTICE SOTOMAYOR: Did you have a good-faith basis to believe the statute of limitations was not applicable?

MR. SHANMUGAM: Midland at the time would file proofs of claim without conducting some sort of exhaustive inquiry, and that's for the simple reason that Midland did not believe that that was legally required. And so, again, there is no record on this issue --

JUSTICE SOTOMAYOR: So what do you do with the committee notes that say that everyone who files a proof of claim has an obligation to do a good-faith inquiry as to whether it's an enforceable obligation or not?

MR. SHANMUGAM: I don't think that that is an accurate characterization of what the advisory

committee did. And let me first --

JUSTICE SOTOMAYOR: No, no. Not what they did; what they said.

MR. SHANMUGAM: I don't think that that's an accurate characterization of what they said, either. And let me explain why that's true.

First of all, let me set out what the advisory committee actually did, because that's a critical part of our argument. In Rule 3001(c)(3), which was adopted in 2012, the advisory committee required certain disclosures, the whole point of which was to put trustees and other parties in interest on notice of the potential availability of a limitations defense.

And the advisory committee thought about going further. It thought about doing, again, exactly what Respondent and the government are asking this Court to do under the FDCPA; namely, to require a certification that having investigated the existence of a limitations defense, the creditor had made a determination that there was no valid such defense.

Now, the advisory committee decided not to do that, Justice Sotomayor, and it decided not to do that for two critical reasons. The first was that the advisory committee recognized that the question of

whether or not there is a valid limitations defense as -- as opposed to the question of whether or not the claim appears to be time-barred, could be complicated. And it could be complicated even in the context of consumer debts like these ones, because of the potential for revival and tolling, choice-of-law issues, and the like.

The second reason --

JUSTICE SOTOMAYOR: I agree with you. But if -- if that is true that you investigated and you had a good-faith basis for believing that it wasn't time-barred, you wouldn't be liable either under the bankruptcy rules or under these debtor rules. So -- but the point is if you were unaware and didn't properly investigate, have you fulfilled your obligations as a lawyer to the bankruptcy court?

MR. SHANMUGAM: And our view, Justice Sotomayor, just to be clear, is that you have done exactly what the code itself contemplates.

And this goes to the second reason why the advisory committee did not go further. The advisory committee expressed a concern that if it had gone further, it could be violating the Bankruptcy Rules Enabling Act because it would be acting inconsistently with the burden-shifting framework that the code itself

devised.

JUSTICE SOTOMAYOR: I'm sorry. I don't remember reading that in these. Could you give me a record cite for that?

MR. SHANMUGAM: I --

JUSTICE SOTOMAYOR: Or you can do it in your reply.

MR. SHANMUGAM: No. It's -- it's in our brief --

JUSTICE SOTOMAYOR: Or --

MR. SHANMUGAM: It's in our brief at page -- I believe it's at page 86 of the Agenda Book where the advisory committee working group discusses the proposal to require creditors to, quote, "State whether the claim is timely under the relevant statute of limitations."

But let me explain that point in a little more detail, because I do think that this is really important to understanding our argument here. The way that the Bankruptcy Code operates is first, that a party is entitled -- a creditor is entitled to file a proof of claim where they have a right to payment. And at that point, the burden shifts. The claim is presumptively valid. And if there is an issue concerning the enforceability of the claim, that is an issue that has to be raised by the trustee or by another party in

interest or else the claim will be allowed.

Now, what I think Respondent and the government are trying to do here is to really align two separate concepts: The question of validity on the one hand and the question of enforceability on the other. And I think Respondent, in particular, is attempting to somehow build the concept of enforceability into the definition of a claim.

But how we know that that is not true is by virtue of the fact that in Section 502(b), the statute -- the code specifically provides that enforceability is a basis for objecting and for disallowing a claim. It doesn't go to the question of whether or not you have a valid claim in the first place.

So, once again, all of this really depends critically --

JUSTICE SOTOMAYOR: I'm -- I'm -- I'm a little bit confused. The fact that the code anticipates that some people will file unenforceable claims even though they shouldn't, that that somehow proves that the code invites unenforceable claims?

MR. SHANMUGAM: Quite to the contrary, Justice Sotomayor. The code specifically wants this to happen because the code defines claims expansively. And

that is because in 1978, when Congress adopted the Bankruptcy Code, it adopted this broad definition of claim to bring claims into the bankruptcy estate. So there is --

JUSTICE SOTOMAYOR: Contingent, unmatured, these are all words that suggest an entitlement to payment. Where in the definition any use of word -- of words talk about a claim that's unenforceable? A contingent claim may not be enforceable today, but it might be in the future.

MR. SHANMUGAM: I agree with the first half of your question, but not the second, Justice Sotomayor, because you're right: The code talks about an entitlement to payment. But that is precisely what we have here. And to the extent that the code includes as examples of types of rights to payment, contingent claims or unmatured claims, that illustrates that the definition of claim includes rights to payment that may not be presently enforceable.

Again, the question of enforceability is a question that arises with regard to objections. It does not relate to the question of an entitlement to file a claim. And this is critical to understanding how the Bankruptcy Code works.

Now, how the Bankruptcy Code works in turn

informs the application of the actual language of the FDCPA, which is, after all, the question before this Court.

JUSTICE KAGAN: Before you get to that language, Mr. Shanmugam. Could you just -- you know, just from a commonsense basis, it seems hard to understand why Congress would want all these unenforceable proofs of claim to flow in, because only two things can happen. One is that the trustee will properly filter out those claims; and the other is that the trustee will be swamped and won't have the time or the energy or the inclination or he'll make mistakes, and some of those claims will be deemed enforceable when, in fact, they're not.

So why would anybody want these proofs of claim to flood into the bankruptcy system?

MR. SHANMUGAM: So, Justice Kagan, two responses to that. The first is that, again, you know, we don't know that these claims are unenforceable. I think what we know is that there is an apparent time bar to these claims. The very facts that are disclosed in the proof of claim illustrate that. And there is some further work to be done before an ultimate legal determination can be made about whether there is a valid limitations defense.

And Congress very consciously put that burden on the trustee and other parties in interest in the Bankruptcy Code. The trustee or the debtor or any other party in interest can come in and object and the issue can be litigated.

JUSTICE KAGAN: But I -- but I -- the understanding here is that this case involves not claims which maybe they're barred by the statute of limitations and maybe they're not, but the issue, as presented to us, is as to claims where everybody knows, including the person who's filing the proof of claim, that they're barred by the statute of limitations.

And what sense could it make for Congress to think, oh, that's a great idea for some -- for people just to file those claims and -- and, you know, the -- on the -- on -- the best thing that can happen is that those claims will be filtered out, and the worst thing that can happen is that they won't be. People will make mistakes and people will pay on things that they shouldn't be paying on.

MR. SHANMUGAM: Yeah. And Justice Kagan, just to be clear, I'm disputing the assumption that we somehow acted with knowledge here. But I'm happy for this Court to consider this case, as we said in footnote 1 of our brief, on the assumption that if there had been

an objection, the claim would have been disallowed.

I think that the answer, though, is still the same. And I think that Congress, in adopting this system in the Code, must have known that some number of claims would be allowed that should otherwise be disallowed if there is an objection. Because after all, that is the unelectable consequence of imposing the burden on responsive parties in deeming claims to be valid, absent and objection.

But the reason -- the affirmative reason why Congress would have wanted to do that is precisely because of the fresh start principle that underlies the entire bankruptcy system.

JUSTICE KENNEDY: Is part of that -- help me, it's on basic bankruptcy law. Suppose I'm a debtor. I know that the claim is time barred. Do I list that claim with the trustee just to be sure that it can be a part of the discharge that the claim is -- that -- that the claim is extinguished and I can't later be sued?

MR. SHANMUGAM: I think it should be listed for the simple reason that there is a valid claim and there is, therefore, a valid right to payment.

JUSTICE KENNEDY: As a routine matter, does -- does the discharge extinguish that claim?

MR. SHANMUGAM: Yes, that is correct. And

the virtue --

JUSTICE GINSBURG: But why would need -- if a claim is time barred, you don't need a fresh start to get rid of that claim. You say it's time barred, therefore, no claim. You don't need a discharge in bankruptcy to accomplish that.

MR. SHANMUGAM: Justice Ginsburg, I disagree with that solely because of the virtue of a discharge. And the virtue of a discharge is that in the language of the Code and the language in particular of Section 523(a)(3), the discharge prevents the creditor from taking any act to collect. And that includes efforts to encourage the debtor, notwithstanding the absence of a judicial remedy, to make any sort of payment, which I think Respondent acknowledges that a debtor retains -- we have some ability to do even after --

JUSTICE KENNEDY: It would also foreclose the possibility of the creditor arguing that there had been a waiver.

MR. SHANMUGAM: Yes. I guess --

JUSTICE KENNEDY: In other words, if the debt is discharged, then the debtor doesn't have to worry about some claim that he had waived the statute of limitations.

MR. SHANMUGAM: Yes. Well, that is correct

in the sense that, again, the creditor can take no action to collect even a sort of voluntary request for payment. And that has very real value. And in addition, as we explained in our brief, discharge has other collateral consequences in prohibiting certain types of discrimination based on the existence of debts. And those are the very principles that again underlie, not just the Code more generally, but the very broad definition of claim in particular. And that really was an innovation of the 1978 Bankruptcy Code, namely, replacing the old provability system with a very broad definition of claim that was meant to bring claims within the bankruptcy process.

JUSTICE GINSBURG: We are talking about the effect of the FDCPA. And isn't it so that there would be no point in making a claim for a debt that's clearly time barred. No point in doing that except for the chance that it will be overlooked, that it will be skipped. And that you will get paid on the assumption that it's a good claim when, in fact, it isn't.

MR. SHANMUGAM: Well, again, I think that that question, Justice Ginsburg, presupposes a state of mind, which is simply not alleged and on which there is simply no record in this case or in other cases. But I don't want to fight that factual premise too hard

because I think that even if such a state of mind exists, the operation of the Code is the same. Again, the state of mind of the creditor is neither here nor there for purposes of the operation of the Code. The sole question for purposes of the operation of the Code is whether or not there is a right to payment. And so when these proofs of claim were filed, the -- there -- there is not an extensive further investigation at that point, or at least I'm certainly not aware of one on the part of in my client or on the part of debt collectors more generally.

What the debt collector is obligated to do under the Code and under the rules is to disclose the information that essentially provides the world notice of a prima facie limitation.

JUSTICE KAGAN: Well, Mr. -- I'm sorry.

MR. SHANMUGAM: Well, I was going to bring this back to the language of the Code because I did want to address that, but Justice Kagan.

JUSTICE KAGAN: Let's suppose that you are right, that the Code allows this. I mean, it's hard for me to believe that the Code actively invites it, but let's suppose, as it's written, allows that. So then you wouldn't violate the Code by filing these proofs of claim. That's -- that's for sure. But why would that

also absolve you from liability under other statutes? The codes does not obligate this. You don't have to do this under the Code. It's a choice. And then another statute can come along and say, you know what, for certain actors, for certain creditors, for these debt collectors, there's an independent rule and the Code says nothing about that.

MR. SHANMUGAM: Yeah. So let me address, first, the specific language of the FDCPA. And I want to put down a marker because I want to address the separate issue of how the FDCPA and the Bankruptcy Code relate.

We think that the operation of the Bankruptcy Code informs the analysis under the two relevant provisions of the FDCPA. First, on the question of whether or not we made false or misleading representations and second, the question of whether or not this is an unfair or unconscionable practice.

On the question of 1692e, our submission is quite straightforward that there is nothing false or misleading about the submission of a proof of claim that is not only entirely accurate, but that affirmatively puts the world on notice as to the existence of a potential limitations defense.

And to go to the second prong of this, the

question of whether or not such a proof of claim is misleading, our submission is that the filing of a proof of claim implies only a good-faith basis that the creditor has a claim. It doesn't imply anything about the enforceability of the claim more generally or about the availability of a limitations defense more specifically other than providing affirmative notice that such a potential defense exists.

JUSTICE SOTOMAYOR: I'm sorry. What do you do with the language of Pennsylvania Public Welfare v. Davenport where we explicitly said that a claim is a right to payment and enforceable obligation? What do you do with that language?

MR. SHANMUGAM: Well, I don't think that -- that that even rises to the level of, in the parlance of the last argument, a drive-by holding. And that's for the simple reason that neither Davenport nor the later cases citing Davenport in any way purported to somehow exclude unenforceable rights from the definition of a claim. In Davenport, everyone agreed that the right in question was enforceable in some respect. And the question was whether the fact that the enforcement mechanism was limited somehow affected whether or not it came within the definition of claim, and the Court said no.

But, again, if you thought that that rose to the level of even a passing holding, I would return to the language of the Bankruptcy Code and, in particular, the definition of a claim which says nothing about enforceability. To the contrary, Section 502 builds enforceability into the objections that have to be raised.

Now, I do want to say a bit about the other provision of the FDCPA, the provision that prohibits unfair or unconscionable practices. And I think that on that provision, we would rely centrally on the protections provided by the bankruptcy system. It bears remembering that a proof of claim, unlike a civil lawsuit, is not filed against the debtor. It is filed against the estate. And as we've been discussing, the trustee bears a statutory obligation to monitor proofs of claim.

JUSTICE SOTOMAYOR: So it's a breach of the trustee's duties if he or she lets the claim go through without objecting?

MR. SHANMUGAM: If some purpose would be served. And, Justice Sotomayor, to the extent that you have concern --

JUSTICE SOTOMAYOR: Well, that was Justice Kennedy's initial question. What would be the purpose

of a trustee permitting a stale claim to go forward?

MR. SHANMUGAM: The trustee should object where, in the language of the statute, some purpose would be served. And I think there are actually contexts in which an objection might be futile because it would have no effect on any of the other creditors or certainly on the amount that the debtor pays. But otherwise, the trustee should object. And I would say that to the extent that you have concern about --

JUSTICE SOTOMAYOR: Where -- where would that situation arise? The amount the creditor pays might be -- the debtor pays might be true, but every other creditor loses if an unenforceable debt is paid.

MR. SHANMUGAM: There -- there could be a case in which the unsecured creditors get nothing. And at that point, it doesn't make any difference because none of the unsecured creditors are going to get paid and there are other similar circumstances.

JUSTICE SOTOMAYOR: So those situations don't account for the $800 million you've collected on these old claims.

MR. SHANMUGAM: Well, I don't -- I don't think that there is a record on how much we've collected with regard to this particular type of claim more generally.

But leaving that aside, I want to make one very important point about the interplay between the Bankruptcy Code and the FDCPA here. I think that Respondent's briefs sort of has this genus-like quality. Because Respondents fight this to some extent on the operation of the Bankruptcy Code. But I think, really, the principal beef that Respondent has here is that the bankruptcy system just isn't works as it should.

If you take a look at pages 29 to 30 of Respondent's brief, Respondent really makes the broader point that trustees and other parties in interest aren't simply objecting as often as they should in bankruptcy and that frustrates --

JUSTICE ALITO: Could I just ask you a practical question? Would there be anything -- suppose a trustee or the attorney for a debtor said, I am going to -- let's say this case is in Alabama. The statute of limitations for the collection of debt in Alabama is six years. I am going to object to every -- any claim for a debt that was incurred more than six years ago. Would -- would that be inconsistent with the duties of the trustee or the attorney?

MR. SHANMUGAM: I mean, no, not necessarily, because at that point essentially what -- what would be happening is that the trustee would say there's a prima

facie limitations defense here, we're going to raise an objection, and at that point the issue would be litigated. And if the creditor in that circumstance didn't come back and request a hearing or otherwise litigate the issue, it -- I think it's quite possible, depending on the nature of the objection, that the objection would be sustained and that the claim would be disallowed.

Again --

JUSTICE ALITO: Well, I'll -- I'll ask Mr. Geyser the same question, but it -- I can't understand why a trustee or an attorney wouldn't take that -- wouldn't take that approach --

MR. SHANMUGAM: Well --

JUSTICE ALITO: -- automatically object to anything that is over the -- the statute of limitations.

MR. SHANMUGAM: Well -- and I think that this illustrates the artificiality of taking the FDCPA and injecting it into the bankruptcy regime.

To be sure, the FDCPA applies to debt collectors specifically, but I think in this context, what would either happen is that there will be an objection and the claim will be disallowed -- that's what took place in this case, albeit on somewhat different grounds. And, of course, in that

circumstance, there is no harm to the actual debtor because the claim has, in fact, been disallowed.

If, in fact, the claim has been allowed, it seems quite odd to say that you could still bring an FDCPA action, because what you would effectively be doing is collaterally challenging the bankruptcy court's decision to allow the claim in the first place. And as we explained in our brief -- and we make this point not only specifically with regard to the standing of this plaintiff, but really with regard to this whole category of cases -- one of the reasons why this practice is not unfair or unconscionable is that it is very hard to posit a circumstance in which it will actually lead to an injury to the debtor. And it's really for that reason --

JUSTICE SOTOMAYOR: I'm sorry. You're taking up trustee time, which gets paid by the debtor ultimately and at administrative cost. You are taking up the time of other creditors, because there has to be, when an objection is raised, notice to all the creditors, a hearing date set, all of these procedural steps that are unnecessary because you have no basis to believe that this debt is enforceable.

MR. SHANMUGAM: Speaking of time, I'd like to reserve the balance of mine, but let me answer your

question, Justice Sotomayor.

It is simply not true that the amount that the trustee gets paid is somehow dependent on the objections that the trustee raises, and I would revert to the fundamental principle underlying our argument. This is exactly how Congress thought the system should work. And if the system as an administrative matter is not working as Congress intended, the solution is to fix the bankruptcy system and not to extend the FDCPA into the domain of bankruptcy.

I'll reserve the balance of my time. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Geyser.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE RESPONDENT

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

Midland is, in fact, using a business model that intentionally floods bankruptcy courts with time-barred debts. And after the first half of the argument, I think two propositions remain undisputed.

The first is that under the Bankruptcy Code, these debts are unenforceable and will lose a hundred percent of the time if anyone objects. The second is

there is literally no scenario where Midland collects unless the system breaks down and fails. What --

CHIEF JUSTICE ROBERTS: Are there other defenses to a debt that you would say are covered by your theory other than the statute of limitations? For example, that the -- the debt was incurred to a contract of adhesion or, you know, the -- the normal list of reasons that a debt might be unenforceable. Does your theory apply to all of those?

MR. GEYSER: Our theory, I think, is exactly what Justice Sotomayor said earlier in the argument. A debt collector has to have a good faith belief that they have a right to payment under the code and have a valid and enforceable debt. If they have any reasonable basis to think that -- that an affirmative defense might not apply, then they don't violate the FDCPA.

JUSTICE BREYER: Well, then what that means is that not just in this case, not just with statute of limitations, that -- that there are a whole set of claims that can be brought in bankruptcy where you would say they don't. They don't have a reasonable good faith belief. And, of course, what they say is we do. We do have a good faith belief. Okay?

And now who's going to decide that? A bankruptcy judge? No. An ordinary judge in a case

brought in an ordinary court where, in fact, if one side wins, they get a thousand dollars per instance plus attorney's fees, plus costs. Now, I thought the point of the Bankruptcy Code was to have bankruptcy matters decided in a bankruptcy court and not in an ordinary Article III court. So how do you reconcile what you are arguing with the basic point of bankruptcy?

MR. GEYSER: Your Honor, I think the point of the Bankruptcy Code is to have legitimate genuine disputes resolved in the Bankruptcy Code.

JUSTICE BREYER: Really? Really. How interesting. Then what do they argue about? In -- in -- I mean, are there cases in bankruptcy court where one side says, I have a legitimate dispute and the other side says, no, you don't? Is that unheard of in bankruptcy court?

MR. GEYSER: Not -- not at all --

JUSTICE BREYER: Is that outside its purpose?

MR. GEYSER: Not at all. And to be very clear, our theory doesn't cover that situation. If a creditor can articulate --

JUSTICE BREYER: Oh. Only when the creditor comes in and says, I admit I had no good-faith reason for bringing this. That's the only thing your theory

covers?

MR. GEYSER: No. This is the situation it covers, and this is all it covers. If the affirmative defense, a complete defense, is obvious on the face of the claim, and if there is not an articulable reason to think that that complete defense may not apply, this is exactly the same standard that applies, and all five courts of appeals have looked at this. This is not shifting the burden, this is not imposing an affirmative certification requirement of all creditors to investigate claims that have no defect on the face of the -- the claim.

CHIEF JUSTICE ROBERTS: Well -- well, but how do you know that's the case in the statute of limitations with respect to a statute of limitations defense? There are exceptions to the statutes of limitations that -- that -- totally -- you know, the whole list of -- so it's hard to say. I mean, but the -- the argument on the other side is look, we've spelled out -- we -- we have to have spelled out the sort of basis. If you think there's a statute of limitations defense, here are the dates of these things. If it's obvious on the face, which was the standard you've proposed, then it ought to be obvious to the other side as well.

MR. GEYSER: Yeah --

CHIEF JUSTICE ROBERTS: How do we know? Do we -- is there some way we know that there wasn't a tolling argument that could be raised in this case?

MR. GEYSER: Your Honor, we -- first, we have alleged that Midland did, in fact, know there was no defense of limitations objection. So that -- that is -- that's how this case comes to the Court.

CHIEF JUSTICE ROBERTS: There was a little disputed footnote battle about that --

MR. GEYSER: Yes --

CHIEF JUSTICE ROBERTS: -- in terms of what the record provided or not.

MR. GEYSER: So -- there was, Your Honor. We -- we think that the original complaint should have been clear in this. It's since been amended to expressly allege that Midland acted with knowledge.

CHIEF JUSTICE ROBERTS: Okay. Let's take the case where the dates, since you asked, it's six years that was incurred, however many years beyond that, and you say they -- they should just not raise it, or you say that they should inquire somehow to make sure that there wasn't a basis for tolling the -- the statute? What -- what do they have to do?

MR. GEYSER: All -- all they have to do is

satisfy and discharge the obligation they have to satisfy and discharge under Rule 9011. It's a basic --

CHIEF JUSTICE ROBERTS: Well, tell me what that is.

MR. GEYSER: It's -- it is a reasonable belief, after a reasonable inquiry, that they have a -- a ground for the complaint, that the evidentiary allegations have some factual support, and that the claim isn't filed for --

CHIEF JUSTICE ROBERTS: So it's -- it's not enough for them to say there might be, it's -- you know, there -- a tolling issue here. I mean, their argument is that that's exactly how bankruptcy works. Here we have a claim, and if there is an objection to it, it shifts to the other side. It seems to me that you're putting a burden on them to research the claim before asserting it in bankruptcy.

MR. GEYSER: Only when the affirmative defense is blindingly obvious on the face of the complaint. And this, by the way, is the exact same rule that applies in Alabama State court.

JUSTICE KENNEDY: Well, let -- let me -- let me ask this. In -- in State courts generally, my understanding is that there is a debt; it is just not enforceable.

Forget bankruptcy. A civil practitioner represents the creditors. They know the debt is time barred. Is it unethical to sue because -- on -- on the theory that the defense may not be waived?

MR. GEYSER: Your Honor --

JUSTICE KENNEDY: They may -- may not be raised?

MR. GEYSER: What -- what --

JUSTICE KENNEDY: If the defense isn't raised as an affirmative defense, as a matter of pleading I assume in some jurisdictions, and it goes to trial and you say, oh, judge, this is time barred, the judge will say, too late, you didn't raise the defense.

MR. GEYSER: An affirmative defense can't be -- can be waived, but I think what's important is that all five courts of appeals that have looked at this have said that if you bring the complaint knowing that it's subject to a complete defense, you're imposing unnecessary costs on a defendant to object.

JUSTICE BREYER: It may not be. I mean it depends on the circumstance. But that isn't what's bothering me and I -- and I put it in a sort of -- you have a very good argument. I'm not saying you don't. I'm telling you what's worrying me.

What's worrying me is that we take a set of

cases, which now you've -- you've narrowed it to that set which is sanctionable under Rule 9011, which is a bankruptcy rule with sanctions. And you're saying in addition to the sanctions, the person who -- the debtor can go and bring a different case now under the word "unfair" in the debt collection act.

And I'm saying what's worrying me, and I'd like to hear what you say specifically, is that here we have two sets of courts; one with the power to sanction; the other the ordinary Article III court, which presumably will automatically give $1,000 per violation, you know, plus attorneys' fees, plus costs. And that seems what the bankruptcy court was trying to avoid. We want bankruptcy matters decided in bankruptcy court.

Now, I don't think I have a convincing argument against you. I have a point. And I'd like to hear what you have to say in response.

MR. GEYSER: We appreciate that. I think the -- the ultimate response is what Congress intended with the Fair Debt Collection Practices Act, which it specifically designed for remedies for professional debt collectors, realizing that ordinary remedies like Rule 9011 sanctions that are calibrated for general creditors aren't always enough. Professional debt collectors are inventive, they impose heightened risks, and you often

need a heightened remedy to check their conduct, which I think is exactly what we see here.

JUSTICE KENNEDY: But if -- if the States were so worried about that, why don't all States do what apparently two States do? They say if the statute of limitation runs, the debt is barred forever. But, apparently, many States don't say that. They say you can still sue.

MR. GEYSER: They -- they do, Your Honor, but I think that States have the option --

JUSTICE KENNEDY: And that's the trouble I'm having in this case.

MR. GEYSER: Well -- well, to be perfectly clear, even States that don't eliminate the debt, there's still not a right to payment, it's not enforceable in any way that's not purely voluntary. And in Alabama -- and this is, I think, critical here -- it actually gives rise not just to a sanctionable act, but to a tort. It's malicious prosecution to file a lawsuit in Alabama subject to the complete defense of a statute of limitations.

JUSTICE BREYER: Is -- is it just the statute of limitations you're talking about, or is it all affirmative defenses?

MR. GEYSER: It's clearly at least the

statute of limitations. I think it's any complete defense to the suit.

JUSTICE BREYER: Sorry. And is it just the statute of limitations you're talking about, or is it all affirmative defenses?

MR. GEYSER: Any affirmative defense --

JUSTICE BREYER: Okay. I'm sorry. Any affirmative defense. Some of these, you know, are quite complicated.

MR. GEYSER: And -- and --

JUSTICE BREYER: And, therefore, we're now going to have the Article III judge -- maybe not in some cases, but in many cases -- deciding pretty complicated things as matters of bankruptcy law growing out of a bankruptcy case.

Now, if that's wrong, why is it wrong?

MR. GEYSER: I think it's wrong for -- for two reasons. The first is that what the -- the matter that they'll be citing in the Fair Debt Collection Practices cases will not be inherent in bankruptcy laws, asking, did you allege a time-barred claim? And it's very easy to --

JUSTICE BREYER: No, no. You missed my whole point. You said it applies to all affirmative defenses.

MR. GEYSER: Oh, I'm sorry.

JUSTICE BREYER: Is the only affirmative defense statute of limitations?

MR. GEYSER: No. The --

JUSTICE BREYER: Then think of the most complicated one you can think of and let's talk about that one.

MR. GEYSER: Well, the most complicated one I can think of we can dispose of very quickly, because anytime there's a good-faith basis defense -- affirmative defense might not apply, we don't have an FDCPA claim.

JUSTICE KAGAN: So what are the other affirmative defenses that your argument might apply to?

MR. GEYSER: I think one example could be a release. Let's say that you sign a release to a claim, and then the debt collector the next day in the bankruptcy files a proof of claim on exactly the same debt they just released. In that case, they're imposing an unnecessary cost on everyone in the process. They're trying to collect a debt that they will only collect in two circumstances. They either actually trick everyone in the system who doesn't realize there's a complete defense, or people do realize there's a complete defense and they acquiesce. And --

JUSTICE KAGAN: Are there any affirmative defenses that your argument might apply to that are bankruptcy-related particularly? Or are these all kind of the sort of defenses that are involved in any suit?

MR. GEYSER: I think logically, it's any complete defense to the proof of claim. We've been focusing on the complete defenses under applicable law.

JUSTICE KAGAN: Right. I was asking, are any of those defenses only bankruptcy related? Do some of them only arise in a bankruptcy proceeding?

MR. GEYSER: I can't think of one off the top of my head, Justice Kagan. What we're looking at are defenses that, again, you file the proof of claim without a good-faith reason to believe it's actually valid and enforceable. That it's -- it effectively is a rule that says creditors can't act in bad faith.

CHIEF JUSTICE ROBERTS: And -- and where -- where does the -- where do you litigate the issue of good faith?

MR. GEYSER: In good faith, you would litigate it in the FDCPA lawsuit.

JUSTICE BREYER: So what you're saying is a set of cases that would warrant a sanction under Rule 9011, if I said to the bankruptcy judge, who happens to know something about it because he's heard the case, if

I were to ask him -- but who's going to bother to ask him? Because I get my attorneys' fees and a thousand dollars and et cetera. If I go into this other court before a judge who doesn't know about it and just issue -- have a litigate on an easy issue, an easy issue, the state of mind of the individual creditor, ah, yes. It's just state of mind. I grant you the easy thing about state of mind is it's only three words, and the difficult thing is, of course, proving what it was.

Now -- now do you see what is worrying me?

MR. GEYSER: I do, I do, Justice Breyer. I think that in the bankruptcy setting, first of all, given the speed of the proof of claim process, the odds are the objection will be adjudicated before the FDCPA suit is -- is far underway or underway at all, which is actually what happened in this case.

I also think that in most circumstances, the state of mind can be satisfied by the creditor by simply articulating any reason they filed the -- the suit. They simply have to explain, why did you -- why did you think you were entitled to collect? Because every claim in the bankruptcy process is automatically deemed prima facie valid and enforceable. And when a debt collector says by filing a proof of claim, I believe I have a right to payment on an enforceable obligation, and they

know that's not true, then they are misstating the character and the legal status of the debt.

JUSTICE ALITO: May I ask you the question that I -- I asked your -- your adversary. Why -- why do these time-barred claims slip through? I mean, that's a big part of your argument. Why don't trustees and attorneys for the debtor automatically object to any claim that is beyond the number of years set out in the statute of limitations?

MR. GEYSER: I think there are two reasons that they don't. The first is that the cost of objecting is sometimes more than the benefit of excluding the claim. These are nuisance-value claims. They often will acquiesce in a legitimate payout simply to avoid the nuisance value of the objection, which I think is unfair.

JUSTICE ALITO: Why is there a big cost in -- in filing an objection?

MR. GEYSER: According to -- to the National Association of Bankruptcy Attorneys, it often takes two to three hours to do all the paperwork, serve the parties. It might not seem like very much, but that -- that does impose a cost on the system.

The other reason that the trustees --

JUSTICE ALITO: I can't believe you couldn't

even have -- you could have a computer program that does this automatically. I can't understand why it would be very difficult.

MR. GEYSER: Your Honor, even if it took only an hour, you're talking about hundreds of thousands of claims filed each year, which, in the aggregate, amounts to an awful lot of time.

The other reason that the trustees --

JUSTICE ALITO: But how many of these would there be in the typical Chapter 13?

MR. GEYSER: What -- what we've seen in at least the cases that have had a chance to go past the pleading stage is that the trustee, for example, the Middle District of Alabama processes between 6 and 7,000 claims a month. So to review the claims, they have to review a claim every two minutes for 365 days a year --

CHIEF JUSTICE ROBERTS: But what kind of claims are you talking about? These -- these kinds of claims?

MR. GEYSER: Well, claims filed in the bankruptcy. But the -- the point is Congress wanted to limit the bankruptcy process to legitimate claims.

CHIEF JUSTICE ROBERTS: So then it's logistically, it's every claim that they -- they look at?

MR. GEYSER: That -- those are the claims that they have to sort through. And I don't -- I --

CHIEF JUSTICE ROBERTS: That doesn't tell us very much about how many of these claims there are.

MR. GEYSER: Well, sometimes we don't know how many claims of these nature there are because sometimes they slip through and no one notices them.

And the other reason that the trustees don't always object, Justice Alito, and they've told us this -- the -- the Chapter 13 trustees at page 15 of their brief, there -- there's an information asymmetry. Trustees assume that creditors act in good faith. So they assume if there's a facially time-barred claim, it's possible the creditor is aware of some basis for tolling. And the trustee doesn't know what the creditor is thinking, and so they might not object, which is a way that these claims are, in fact, misleading, even to sophisticated trustees.

So the real point is that Midland wouldn't file these claims if the system actually functioned the way that Congress intended. If -- if it did function and everyone objected the way they were supposed to, these claims would always lose.

JUSTICE ALITO: I find this is a very difficult case because if -- if your description of

Midland's business model is correct, it doesn't seem to me that it has much, if any, social utility.

On the other hand, I have real a problem with your -- with fitting your argument into the concept of an affirmative defense. I thought an affirmative defense was a rule of law that may allow the defendant to prevail if the defendant asserts the defense. But you want to switch -- you're switching that over to the side of the plaintiff or the person filing the claim. It seems inconsistent with the whole idea of an affirmative defense.

The idea of an affirmative defense -- let's take statute of limitations. The idea is that the defendant may escape liability based on the statute of limitations, but only if a defendant asserts the defense and, if necessary, proves it. And if a defendant doesn't do that, then the law is perfectly content with having a recovery on a claim that would have otherwise been time barred.

MR. GEYSER: Well, I -- I think that, again, we're -- we're not talking about affirmative defenses that aren't obvious on the face of the -- of the claim. Under Rule 9011 -- and -- and just thinking about the way a creditor would normally approach this, if they look and they realize there's a facially obvious time

bar -- this case is a great example. The debt's over a decade old. They missed the limitations period by almost five years on a six-year limitation period. They almost doubled the -- the length of time they had to file.

JUSTICE BREYER: In this case, is it -- is there something in the record? I mean, it's rather surprising to me that there is a company and their business model, you say, is to go around buying up debts that can't be enforced and are worthless, and then filing cases hoping that no one will notice. Is that shown in the record? I mean, is somebody -- they admit that's their business model? Where does this come from?

MR. GEYSER: Your Honor, I think it comes from -- first, this was dismissed on the pleadings, so we can develop it in the case. But it comes from the FTC report that analyzed the data of debt collectors and --

JUSTICE BREYER: The FTC says that's what they did.

MR. GEYSER: It says they buy debts for pennies on the dollar. The amount of the debt --

JUSTICE BREYER: Why didn't the FTC then bring an action against them if that's what they're doing?

MR. GEYSER: Well, the government sometimes does.

JUSTICE BREYER: We then have the FTC that could do such a thing. We have the sanctions in the Bankruptcy Code, and now you want this, too?

MR. GEYSER: Congress wanted this, too. The entire purpose of the FDCPA is to use the private attorney general function to police professional debt collector misconduct.

JUSTICE SOTOMAYOR: Counsel, I have been able to find only one judge who has been able to get around 911's limitation. 911 is the sanctioning power, right?

MR. GEYSER: That's correct.

JUSTICE SOTOMAYOR: You have to, like Rule 11, give notice to the other side that they're violating, right?

MR. GEYSER: That's correct.

JUSTICE SOTOMAYOR: And if they withdraw the claim at that point, there's no sanctions, right?

MR. GEYSER: That -- that's right. Unless --

JUSTICE SOTOMAYOR: There's only one judge I found in the bankruptcy context who has used his inherent powers. But that's a rare action where a judge

resorts to inherent powers.

MR. GEYSER: That's exactly --

JUSTICE SOTOMAYOR: This model -- this model is beautiful. You file a claim you know is old. If you get paid, wonderful. If somebody objects, you withdraw it. There's no sanction that's possible.

MR. GEYSER: That's correct.

JUSTICE SOTOMAYOR: And it just keeps on going.

MR. GEYSER: It -- it does. And that's exactly why you need the FDCPA as a backstop and why Congress designed it as an overlay to existing remedies calibrated for general creditors. And we know that Midland in fact does do exactly what you've described. They file a time-barred claim. They're caught. Someone moves for sanctions. They withdraw the claim. And it -- it's a great system, but it's not exactly what Congress intended in the Code.

And just to respond, there is no benefit to including these time-barred claims in the Code, as Chief Judge Wood explained in her Seventh Circuit dissent. The time bar is virtually exactly the same as a discharge injunction in the broadest majority of cases. Debtors often don't list time-barred debts on their schedules because they don't care about them. No one

declares bankruptcy to escape a stale debt. They declare bankruptcy to escape enforceable obligations.

JUSTICE KENNEDY: It's a little hard for -- to imagine how to write a opinion to say that the law is a trap for the unwary. But that's -- that's in effect what you want us to say.

MR. GEYSER: Oh, not at all, Your Honor. Our law is actually -- our rule is exactly the opposite.

JUSTICE KENNEDY: The uncounseled person gets a notice of -- of demand for payment. The uncounseled person doesn't know about a statute of limitations. So it's a trap for the unwary. But the law makes that trap. That's my problem.

MR. GEYSER: Well, the FDCPA exists to protect the uncounseled person to avoid -- I'm sorry.

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MR. GEYSER: -- to avoid the trap for the unwary. That -- that's why the FDCPA exists.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Harrington?

ORAL ARGUMENT OF SARAH E. HARRINGTON

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MS. HARRINGTON: Thank you, Mr. Chief

Justice, and may it please the Court:

In our view, no creditor is entitled to file a proof of claim in bankruptcy on a claim that the creditor knows is time barred. When the bankruptcy system works --

JUSTICE KENNEDY: Is that also true in a civil action generally, forget bankruptcy?

MS. HARRINGTON: Yes. In our view, in all five court of appeals that considered the issue have held --

JUSTICE KENNEDY: So if a -- if a creditor files suit on a debt that's time barred, the defendant doesn't raise it. The judge said, I hereby grant an award of $10,000 for the debt and I sanction you for Rule 11 -- under Rule 11.

MS. HARRINGTON: Well, that's not -- there are lots of situations where a prevailing party can be sanctioned for litigation conduct. Under Rule 11, a -- a district court judge has great discretion about whether to award sanctions, and there might be reason not to do so.

JUSTICE KENNEDY: Is that a plausible scenario? In other words, the -- the law allows recovery, but you sanction the attorney for getting it?

MS. HARRINGTON: Well, I think it may be

that most district courts would not -- would choose not to exercise their discretion by awarding sanctions.

JUSTICE KENNEDY: Do you think that that is -- that that is a plausible exercise of Rule 11 power?

MS. HARRINGTON: Well, let me -- let me put it this way. You can imagine --

JUSTICE KENNEDY: To sanction someone because they prevailed in a case.

MS. HARRINGTON: I think it's --

JUSTICE KENNEDY: That's without any misleading. All they've done is file a suit.

MS. HARRINGTON: I think it is plausible, but unlikely to happen. But if -- but if you can think about it more broadly. If you can imagine a system where a plaintiff was permitted and entitled, in Petitioner's words, to come in and throw up any possible legal argument no matter how frivolous, and the burden was on the defendant to shoot all of those arguments down, that is not the system that we have adopted. Rule 11, every court of appeals to consider the issue has suggested -- has held that Rule 11 requires a party to certify that it has done a reasonable investigation and has a good faith-basis for believing that its claims are warranted by law. Every court of appeals that has considered it has said that that includes forebearing

from filing a lawsuit when it is obvious that it is -- that there's a landscape of defense.

JUSTICE BREYER: It's bankruptcy and that's what worries me. Of course there will be a set of claims where the person is behaving pretty badly. But there's a remedy right in the Code. It's called a sanction. Moreover, if they really go around doing this, I don't know why the FTC wouldn't bring a claim saying this is an unfair business practice. So if in fact you say they also have a remedy under this other act, it's quite possible, given the remedies that they have under the other act, that lawyers won't move for sanctions. They won't bother with it.

MS. HARRINGTON: Exactly.

JUSTICE BREYER: They will go right into court and then we'll have two sets of courts and other people trying to decide the same question. The same problem that was bothering me 15 minutes ago and I'd like to -- I'd like to know what you think of that.

MS. HARRINGTON: I'd love to tell you. The exact same thing is true in the general civil litigation context, that there is the possibility of Rule 11 sanctions just like there's a possibility of Rule 9011 sanctions. In the very statutory findings in the FDCPA, Congress said in our view, existing legal remedies are

not sufficient to deter this kind of conduct from debt collectors.

CHIEF JUSTICE ROBERTS: Well, bankruptcy is very different. The whole idea is let's get everything here in one place and -- and deal with it, you know, and different priorities and all of that. I think it's much more significant if you have things spinning out of the bankruptcy estate being adjudicated elsewhere than the fact that you might have it as a general matter in -- in district courts.

MS. HARRINGTON: Well, Mr. Chief Justice, it's a bedrock principle of bankruptcy that a creditor's rights with respect to a debt are defined by State law. When a debt is time barred, State law has determined that that debt is not judicially enforceable. Nothing in the bankruptcy gives a creditor an extra right to judicially enforce the debt. That's --

JUSTICE GINSBURG: Do you place any weight on this Fair Debt Collection Act being limited to particular kinds of creditors; that is, this is not for your everyday creditor. It is only for these debt collectors.

MS. HARRINGTON: That's right, Justice Ginsburg. I want to just emphasize, though, that in the government's view, this case is as much about abuse of

bankruptcy as it is about a violation of the FDCPA. The way we think --

JUSTICE BREYER: If that's so, then why not -- what about this. It's a little complicated as a solution and so I'm pretty nervous. I don't know that I'd really do this. But you'd say okay. The word in the debt collection act is unfair and where it's in bankruptcy, there's a whole system to decide if it's unfair by people who know about it. So where a bankruptcy court does in fact say that it's unfair and sanctions a party for this unfair behavior. In that case, it's unfair within the meaning of the debt collection act and in that case, you can go and bring your extra remedy.

MS. HARRINGTON: So there are two reasons, I think, why that would not work. The first is, as Justice Sotomayor pointed out, there's a safe haven in Rule 9011, just like there is in Rule 11 since 1993 that allows a creditor to withdraw in offending a proof of claim when it's objected to. Now, I just want to point out, if a -- if a creditor really has a basis for -- a good-faith basis for believing that its claim is enforceable, it will presumably assert that in response to an objection. That's not what happened here.

But the second is that there is even more

reason to be cautious about this in bankruptcy than there is in general civil litigation. Because by operation of Rule 3001 of the bankruptcy rules and Section 502 of the Code, a proof of claim, when it's failed, makes the underlying claim presumptively valid.

JUSTICE ALITO: Do you think this good faith defense is objective or subjective?

MS. HARRINGTON: We think it's objective -- or it's the same -- it's basically the same.

JUSTICE ALITO: It's objective?

MS. HARRINGTON: It's objective. All we are doing is saying the same standard that would be applied under Rule 9011 or Rule 11 should be applied here.

JUSTICE ALITO: And you said -- take the case of -- this was the third debt collection act. You're just talking about debt collectors. So -- but let's under bankruptcy, you have a single creditor, a person who owns a sandwich shop has a claim. It's -- it turns out that it's clearly barred by the statute of limitations, files that claim. That's sanctionable conduct?

MS. HARRINGTON: As a practical matter, it probably wouldn't be because they would withdraw.

JUSTICE ALITO: As legal matter, it would be under your interpretation.

MS. HARRINGTON: If they didn't have a good-faith basis for believing that the limitations period didn't apply in that case because of tolling or some other equitable principle --

JUSTICE ALITO: Subjective. They were acting in perfect good faith subjectively, but not objectively.

MS. HARRINGTON: Well, Rule 9011 requires a lawyer or another party to certify they have done a reasonable investigation and have a good-faith basis for believing that their claims are warranted by existing law. And so if they haven't done that reasonable investigation or if they have ignored the results of that investigation, which must have been happened here, then they violated Rule 9011 and engaged in unfair and misleading practices.

CHIEF JUSTICE ROBERTS: What other affirmative defenses does your theory apply to?

MS. HARRINGTON: Well, think about freedom from the defense of res judicata. If a creditor had sued in state claim on a timely -- a timely debt, and the state court had said: This is not a valid claim. We wouldn't want a system where that creditor could then file a proof of claim in bankruptcy, hoping that the claim would just slip through the cracks and get paid

even though the creditor knew for sure --

CHIEF JUSTICE ROBERTS: A lot of these affirmative defenses though in -- aren't presented as abstractly as that. They may involve nuances.

We have cases about the scope of res judicata and when it applies. What other -- I assume your argument applies to every affirmative defense.

MS. HARRINGTON: Only if it's obvious, and if the creditor doesn't -- is able to access all the information without discovery. That's the rule that's been applied in the Rule 11 context --

JUSTICE KENNEDY: The Rule applies to every affirmative defense.

MS. HARRINGTON: Every obvious affirmative defense where the creditor or the plaintiff --

JUSTICE KENNEDY: Are there any nonobvious affirmative defenses to which it wouldn't apply?

MS. HARRINGTON: I mean, I think something like contributory negligence may be kind of a classic affirmative defense that would be -- it would be hard to -- to say that the plaintiff in the civil litigation had an --

JUSTICE KENNEDY: How about a lack -- lack of personal jurisdiction?

MS. HARRINGTON: Lack -- I mean, I guess it

depends on the circumstances. If there's -- if the creditor --

JUSTICE KENNEDY: You know -- you know there is no personal jurisdiction, but you filed a -- filed a suit anyway, and the Rule says that -- that it has -- you have to make an objection.

MS. HARRINGTON: I don't think that would arise in a bankruptcy context, but in a civil litigation context --

JUSTICE KENNEDY: I'm talking about just -- as ordinary civil litigation.

MS. HARRINGTON: I think if -- what I would say is if the Court could sanction that under Rule 11, then we think --

JUSTICE GINSBURG: In the ordinary civil litigation, the defendant can always consent to personal jurisdiction. So it's -- it's --

JUSTICE KENNEDY: And he can always consent to the waiving of the statute of limitations by not raising it.

MS. HARRINGTON: But -- but not in bankruptcy because it's -- if it -- the debtor cannot consent to the -- to the payment of a time-barred claim because that takes money away from other creditors --

JUSTICE BREYER: Why can't they consent?

Suppose it's Chapter 11? Suppose they're trying to get a plan? Suppose the plan is a company that does business in countries -- I know you don't believe there are such countries, but there are, there are countries where it's a matter of honor to pay a debt. And people actually do pay debts.

(Laughter.)

MR. HARRINGTON: I believe that.

JUSTICE BREYER: All right. So you could -- it's easy to think of cases.

MS. HARRINGTON: Justice Breyer, I --

JUSTICE BREYER: Yeah.

MS. HARRINGTON: -- I -- I think the one thing everyone agrees on in this case is that if the bankruptcy system works as Congress intended, 100 percent of time-barred claims will be disallowed. That is what Congress intended, but --

JUSTICE SOTOMAYOR: Why --

JUSTICE BREYER: Well, in Chapter 11 I'm not sure they did --

MS. HARRINGTON: Because it --

JUSTICE BREYER: But regardless of that dispute.

MS. HARRINGTON: Okay. This --

JUSTICE BREYER: Is -- is -- is the

automatic stay applied to these actions or not?

MS. HARRINGTON: Yes. In our view these are claims within the meaning of the Bankruptcy Code.

JUSTICE BREYER: So -- so they can't proceed in the -- the -- under the ^ cap? debt act until the bankruptcy is over.

MS. HARRINGTON: That's true, yes.

JUSTICE BREYER: Okay.

MS. HARRINGTON: And -- and also, you know, in terms of the discharge, the FDCPA gives the debtor the right to ask not to be contacted any more by a debt collector, which is basically the functional equivalent of a discharge, and the anti-discrimination provisions apply to any dischargeable debt, not just debt that has been discharged, and so that would apply to these -- to these types of debts.

And so I just think it -- there is nothing in the code that gives a creditor the right to try to sneak one through when the creditor knows that if it's objected to, it should be disallowed --

JUSTICE KAGAN: Is your argument --

MS. HARRINGTON: -- 100 percent of the time.

JUSTICE KAGAN: -- dependent on a view of the code that precludes these kinds of claims?

MS. HARRINGTON: Yes. Yes.

JUSTICE KAGAN: So if -- if one looked at the code and said, well, it seems as though these kinds of claims, although unenforceable, can be filed, if that was your view of the code, what do you think follows from that?

MS. HARRINGTON: So then I think it would not be unfair and it would not misleading, and if I'd like -- if I could, I'd like to tell you why. It's -- the reason it's unfair here is because the creditor does not have a right to get paid in bankruptcy on this type of claim and so it's unfair to try to do that and to put the other participants to the burden of making sure that it doesn't happen.

It's misleading because when you file a proof of claim under Rule 9011 you're making an implicit representation -- may I finish my sentence? That you have done a reasonable investigation and have a good faith basis for believing that the claim is warranted. If it is warranted under the Bankruptcy Code then that's not misleading.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Three minutes, Mr. Shanmugam.

REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you,

Mr. Chief Justice.

Just two points on rebuttal. First, I think, with all due respect, the Court should be concerned about the breadth of Respondent's position, and let me lay out circumstances that I think would be covered by Respondent's rule.

A circumstance in which a claim has been discharged in a previous bankruptcy, a circumstance, in which a claim has in fact actually been paid off. A circumstance in which the claim is subject to a setoff, or a circumstance in which the creditor simply gets the wrong amount or the wrong person. These circumstances, I'm reliably informed, recur with some frequency in bankruptcy proceedings, and yet, in all of those circumstances, after an objection is raised and the claim is disallowed. There could be a claim that the claim itself was false or misleading under the FDCPA, and a holding in Respondent's favor would really be a recipe for clogging the courts with these sorts of FDCPA claims.

And I would note, parenthetically, that to the extent the Respondent and the government's argument presupposes some absence of a good faith basis for believing that some of these objections are invalid. That's very hard to reconcile with the language of the

FDCPA because if there is one established principle about the operation of the FDCPA, it is that there is no affirmative state of mind requirement. And so what Respondent and the government would be asking you to do is to say, sure, there could be a prima facie claim under the FDCPA, but the only way in which a creditor could escape liability would be to invoke the affirmative defense in Section 1692k paragraph c, where the violation is not intentional and results from a bona fide error which requires the maintenance of procedures reasonably calculated to avoid that error.

And so, again, this is going to be a recipe for bringing these FDCPA actions into play, and many, many bankruptcies.

And that leads me to my second point, which is that this Court has never applied the FDCPA within the four corners of a bankruptcy proceeding, and I think that the problem with doing so here is that it really doesn't address the principle concern that Respondent and the government raises, and let me give you an example as to why that's true.

Suppose you have a bank that holds credit card debt, and that bank actually doesn't sell that debt on to a debt collector. Well, that bank could do the very same thing. It could file a proof of claim, it

would be required to disclose that there is a prima facie limitations defense, and yet, if that bank does not qualify as a debt collector under the definition of the FDCPA. FDCPA liability would not be available, and that simply illustrates the fact that this is really a problem, if it is, in fact, a problem, with the operation of bankruptcy, and it's a problem that Congress or the advisory committee are -- are best situated to remedy, and so, for instance, if there is concern about the limitations defense, one solution is to eliminate the fact that that's a defense, and for Congress to shift the burden back on to the creditor. But, again, that's a remedy in the particular context of bankruptcy.

And just to address, finally, the government's broader argument about the sanctionability of conduct outside bankruptcy. This Court has never held that it would be a violation of Rule 11 for a plaintiff to file a complaint in the face of an obvious defense, whether it's a limitations defense or some other type of defense. And notwithstanding the rather cursory analysis in the court of appeals' cases that Respondent and the government cites, I would respectfully submit that that would be an astonishing proposition for civil litigants if this Court were to

adopt it and it would have very broad consequences against -- across the full range of litigation.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a creditor violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, by filing an accurate proof of claim in a bankruptcy proceeding for an unextinguished time-barred debt that the creditor knows is judicially unenforceable.

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In the Supreme Court of the United States

No. 16-348

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.*, authorizes the Consumer Financial Protection Bureau (CFPB) to "prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA]." 15 U.S.C. 1692*l*(d). The CFPB, the Federal Trade Commission (FTC), and other federal agencies are responsible for enforcing the Act through administrative proceedings and civil litigation. 15 U.S.C. 1692*l*(a)-(c). In addition, United States Trustees, who are appointed by the Attorney General, are charged with supervising the administration of bankruptcy cases. 28 U.S.C. 581-589a. The United States therefore has a substantial interest in the Court's resolution of the question presented.

STATEMENT

1. a. Congress enacted the FDCPA in 1977 in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a). Congress found that "[e]xisting laws * * * are inadequate to protect consumers," and that "the effective collection of debts" does not require "misrepresentation or other abusive debt collection practices." 15 U.S.C. 1692(b) and (c). The Act accordingly subjects a "debt collector"—a defined term that refers to "third-party collectors of consumer debts," *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1598 (2016)—to various procedural and substantive requirements that are designed to "eliminate abusive debt collection practices" and to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," 15 U.S.C. 1692(e).

The Act prohibits debt collectors from, *inter alia*, "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and specifically bars debt collectors from making a "false representation of * * * the character, amount, or legal status of any debt," 15 U.S.C. 1692e(2)(A). The Act further provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. The Act authorizes civil actions against "any debt collector who fails to comply with any provision of [the FDCPA] with respect to any person." 15 U.S.C. 1692k.

b. Petitioner is a debt collector that regularly purchases accounts with overdue balances and attempts to collect the past-due amounts. Pet. App. 3a. "Debt

collection is a $13.7 billion dollar industry," consisting of "approximately 6,000 collection agencies" and affecting approximately "35% of Americans, more than 77 million people." CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 8 (Mar. 2016).[1] A "substantial part" of the debt-collection business involves "debt buying." *Id.* at 10; see FTC, *Collecting Consumer Debts: The Challenges of Change* 13 (Feb. 2009).[2] Debt buying typically involves bundling debt into portfolios that "generally share common attributes," including "the type of credit issued" and "the elapsed time since the consumer accounts went into default." FTC, *The Structure and Practices of the Debt Buying Industry* 17 (Jan. 2013) (2013 FTC Report).[3] "[D]ebt buyers generally pa[y] less for older debts than for newer ones." *Id.* at 23. One FTC analysis of debt-buying practices from 2006 to 2009 shows that debt buyers paid on average 7.9 cents per dollar for debts less than three years old, 3.1 cents per dollar for debts three to six years old, 2.2 cents per dollar for debts six to 15 years old, and effectively nothing for debts more than 15 years old. *Id.* at 22-24.

c. Every State has adopted a limitations period for suits to collect unpaid debts. See, *e.g.*, Fred O. Williams, *State statutes of limitation for credit card debt*[4] (col-

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[1] http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

[2] https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

[3] https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[4] http://www.creditcards.com/credit-card-news/credit-card-state-statute-limitations-1282.php (last updated July 12, 2016).

lecting state laws). Although limitations periods vary, most are between three and six years, and no State has a limitations period longer than 15 years. 2013 FTC Report 42. Expiration of a limitations period typically does not extinguish a debt, but it precludes the creditor from recovering on the debt through the use of judicial processes.[5] *Ibid.* In most States, a consumer must invoke the statute of limitations as an affirmative defense. *Id.* at 45.

2. A debtor commences a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301. Individual debtors typically file for relief under Chapter 7 of the Bankruptcy Code (Code), which provides for a liquidation of a debtor's non-exempt assets in exchange for a discharge of pre-petition debts, 11 U.S.C. 701 *et seq.*; or under Chapter 13, which provides for the adjustment of debts of an individual with regular income, 11 U.S.C. 1301 *et seq.* An individual debtor must file with the bankruptcy petition, *inter alia*, a list of his secured and unsecured creditors. 11 U.S.C. 521(a)(1)(A); Fed. R. Bankr. P. 1007(a); U.S. Courts, *Bankruptcy Forms: 106D and 106E/F*. The Code defines "creditor" to mean any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. 101(10)(A). The term "claim" is defined to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). This Court has

[5] In Mississippi and Wisconsin, the expiration of a limitations period for collecting a debt extinguishes the debt. Miss. Code Ann. § 15-1-3 (Supp. 2011); Wis. Stat. Ann. § 893.05 (West 1997).

explained that "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990).

A creditor with a claim against a debtor "may file a proof of claim," 11 U.S.C. 501(a), which consists of a "written statement setting forth a creditor's claim," Fed. R. Bankr. P. 3001(a). A "proof of claim executed and filed in accordance with [the Federal Rules of Bankruptcy Procedure] shall constitute prima facie evidence of the validity and amount of the claim," Fed. R. Bankr. P. 3001(f), and the claim is "deemed allowed" unless a party in interest to the bankruptcy proceeding (*e.g.*, the debtor, the trustee, or another creditor) files an objection to the claim, 11 U.S.C. 502(a).

The Code establishes a mechanism for disallowing unenforceable claims. Any party in interest may object to a proof of claim, 11 U.S.C. 502(a), and the trustee in a Chapter 13 bankruptcy "shall," "if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper," 11 U.S.C. 704(a)(5), 1302(b)(1). When a party objects to a claim that "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured," the bankruptcy court must disallow it. 11 U.S.C. 502(b)(1). The Code further specifies that the bankruptcy estate (which is created when a debtor files a bankruptcy petition) "shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation." 11 U.S.C. 558.

3. a. In March 2014, respondent filed a Chapter 13 bankruptcy petition. Pet. App. 3a. Several months later, petitioner filed a proof of claim in respondent's bankruptcy, seeking repayment of $1879.71. *Ibid.* Petitioner had purchased that debt from Fingerhut Credit Advantage. *Ibid.* The last transaction on that account was in May 2003, and the applicable statute of limitations for a creditor to collect on that debt is six years. *Ibid.*; Ala. Code § 6-2-34 (LexisNexis 2014). Respondent objected to the proof of claim on the ground that it did not contain supporting documentation, J.A. 21, and the bankruptcy court disallowed the claim, see J.A. 10 (Docket entry No. 22).

b. Respondent sued petitioner in the United States District Court for the Southern District of Alabama, alleging that petitioner's filing of a proof of claim for time-barred debt violated the FDCPA because it was deceptive and misleading under Section 1692e and was unfair and unconscionable under Section 1692f. Pet. App. 3a-4a, 19a; see J.A. 23-28. Petitioner moved to dismiss, arguing that the Bankruptcy Code precluded any right to relief the FDCPA otherwise might give respondent, and that respondent's allegations failed in any event to state a claim under the FDCPA. Pet. App. 19a.

The district court granted petitioner's motion to dismiss. Pet. App. 18a-37a. The court acknowledged that, under circuit precedent, the filing of a proof of claim in bankruptcy for a time-barred debt violates the FDCPA. *Id.* at 19a (citing *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256-1257 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015)). The court held, however, that this prohibition was in irreconcilable tension with the Bankruptcy Code provision

permitting a creditor to file a proof of claim. *Id.* at 20a-37a. The district court concluded that the Code had impliedly repealed the relevant prohibitions in the FDCPA, at least as applied to the filing of a proof of claim for an unextinguished debt that a creditor knows is time-barred. *Id.* at 31a n.17.

c. The court of appeals reversed and remanded. *Id.* at 1a-15a. The court stated "that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." Pet. App. 7a. It held, however, that "when a particular type of creditor—a designated 'debt collector' under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA." *Ibid.*

The court of appeals held that the doctrine of implied repeal had no application in this case because "[t]he FDCPA and the Code are not in irreconcilable conflict." Pet. App. 11a. The court explained that the two statutes, which "provide different protections and reach different actors," "can be reconciled" because "[t]he Code establishes the ability to file a proof of claim, while the FDCPA addresses the later ramifications of filing a claim." *Id.* at 12a (internal citation omitted). The court further explained that, "when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a 'misleading' or 'unfair' claim." *Id.* at 13a. The court also emphasized that the FDCPA contains a "safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith

belief resulting from a recording error that the statute of limitations had not in fact run on the claim." *Id.* at 14a n.1 (citing 15 U.S.C. 1692k(c)).

SUMMARY OF ARGUMENT

The FDCPA prohibits a debt collector from filing a proof of claim in a bankruptcy for a debt that the debt collector knows is time-barred.

A. Outside bankruptcy, a plaintiff who knowingly files a time-barred suit is subject to sanctions for litigation misconduct. That is so even though most jurisdictions treat expiration of a statute of limitations as an affirmative defense. In the debt-collection context, a plaintiff will typically be well-positioned to ascertain the facts needed to determine whether a suit is timely. When a debt collector sues or threatens to sue to collect a debt it knows is time-barred, it violates the FDCPA's prohibitions on "misleading" representations and on "unfair" means of debt collection. That understanding accords with the consistent holdings of the federal courts of appeals that have addressed the issue.

B. The same general rules apply in bankruptcy. Contrary to petitioner's argument, the Code does not authorize the filing of a proof of claim for a debt that the creditor knows is unenforceable under applicable law. The Code directs that a claim for a time-barred debt should be disallowed. A creditor that knowingly files such a claim is subject to sanctions under Federal Rule of Bankruptcy Procedure 9011, and potentially to other remedies for bankruptcy abuse. The fact that the Code contains other mechanisms designed to prevent such claims from actually being paid does not alter that conclusion.

In bankruptcy as in other contexts, the FDCPA prohibits a debt collector from invoking judicial processes to collect a debt that the collector knows is time-barred. When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA.

Although the Code allows the trustee and other creditors to object to a proof of claim for a time-barred (or otherwise unenforceable) debt, the volume of bankruptcy litigation makes it inevitable that some such proofs of claim will escape detection. The deliberate filing of proofs of claim for debts known to be time-barred reflects a calculated effort to exploit the imperfections of the Code's disallowance mechanisms, and to prevent the claims-allowance process from functioning as Congress intended. Many such proofs of claim, moreover, are submitted by debt buyers who are able to purchase time-barred debts for pennies on the dollar precisely because those debts are understood to be legally unenforceable. And, contrary to petitioner's argument, the improvident allowance of proofs of claim for time-barred debt often harms the individual debtor as well as other creditors.

C. The Code does not effect an implied repeal of the FDCPA or otherwise preclude application of the Act to petitioner's conduct. To a large extent, petitioner's preclusion and implied-repeal arguments rest on the same mistaken premise—*i.e.*, that the bankruptcy laws authorize creditors to file proofs of claim for debts they know are time-barred—that underlies petitioner's contention that such practices are not "misleading" or "unfair" within the meaning of the FDCPA. Because the Bankruptcy Code and Rules

prohibit all creditors from engaging in that conduct, application of the FDCPA to debt collectors who do so would not create any conflict between the Code and the Act.

Petitioner also suggests that, even if the knowing submission of a proof of claim for a time-barred debt is properly viewed as an abuse of the bankruptcy process, the only remedies for such abuse are those established by the bankruptcy laws themselves. But the FDCPA applies by its plain terms to debt collectors' invocation of judicial processes in the course of their collection efforts, and the courts of appeals that have addressed the question have consistently held that a debt collector violates the Act if it initiates a civil suit to collect a debt it knows is time-barred. Petitioner identifies no sound reason to treat bankruptcy litigation as an exception to the general rule that a debt collector's litigation misconduct may subject it to liability under the FDCPA.

ARGUMENT

THE FDCPA PROHIBITS A DEBT COLLECTOR FROM FILING A PROOF OF CLAIM IN A BANKRUPTCY FOR A DEBT THAT THE DEBT COLLECTOR KNOWS IS TIME-BARRED

Outside bankruptcy, a creditor may be sanctioned for filing a debt-collection suit that the creditor knows is time-barred under state law. If that creditor is an FDCPA "debt collector," filing or threatening to file such a suit would violate the Act's prohibition on misleading representations and unfair practices in connection with the collection of a debt. Within bankruptcy, a creditor who files a proof of claim for a debt that the creditor knows is time-barred is similarly subject to sanctions. And when that creditor is a debt

collector, it violates the FDCPA. Nothing in the Bankruptcy Code suggests that a creditor is entitled to file a proof of claim for a debt that it knows is time-barred, and nothing in the Code precludes the application of the FDCPA to debt collectors who engage in that abusive practice.

A. The FDCPA Prohibits A Debt Collector From Filing Suit Outside Bankruptcy Seeking To Collect A Debt That The Debt Collector Knows Is Time-Barred

1. Outside bankruptcy, a plaintiff who files a suit that the plaintiff knows is time-barred is subject to sanctions for filing a frivolous suit and potentially for acting in bad faith. Federal Rule of Civil Procedure 11 requires attorneys (and unrepresented parties), *inter alia*, to certify when filing in court any "pleading, written motion, or other paper" that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," "the claims, defenses, and other legal contentions" in the filing "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). On its face, that Rule demands that a plaintiff (through counsel) must undertake a reasonable inquiry into whether any claims she plans to assert in federal court are supported by non-frivolous legal arguments.

Federal courts of appeals agree that a plaintiff violates Rule 11 if information in her hands or easily accessible to her shows that her claim is barred by an "obvious" affirmative defense. See, *e.g.*, *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994); *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1384-1385 (4th Cir. 1991); *White* v. *General Motors Corp.*, 908 F.2d 675,

682 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); see also *Tura* v. *Sherwin-Williams Co.*, 933 F.2d 1010, 1991 WL 88346, at *1 (6th Cir. 1991) (Tbl.) (unpublished); *Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985). A plaintiff need not forbear from filing suit if she has a non-frivolous argument that a generally applicable affirmative defense would not prevail in her case, or if she needs discovery to assess the strength of a potential affirmative defense. *White*, 908 F.3d at 682; see *Calhoun*, 34 F.3d at 1299. But when the plaintiff has all the information necessary to identify a clearly meritorious affirmative defense, she can be sanctioned under Rule 11 if she files suit.[6]

Thus, while a limitations bar is generally treated as an affirmative defense that must be raised by a defendant or waived, Rule 11 requires a plaintiff to consider whether an "obvious" limitations bar applies before filing a complaint. That is so in part because a potential plaintiff typically possesses all the information needed to determine whether a limitations period has expired. Thus, while the defendant typically bears the burden of pleading a statute-of-limitations defense, "[a] pleading requirement for an answer is irrelevant to whether a complaint is well grounded in law." *Brubaker*, 943 F.2d at 1384. To treat the knowing assertion of a time-barred claim as a legitimate litigation practice would be to embrace the notion that, "because of the ignorance of one's adversary, one could advance a claim groundless in law." *Id.* at 1385.

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[6] A potential defendant can waive a statute of limitations defense. If a potential plaintiff and a potential defendant agree out of court to settle a time-barred claim through a court-enforced consent decree, the plaintiff would not violate Rule 11 by simultaneously filing a complaint and a proposed consent decree.

In the context of debt collection, the existence of a valid limitations defense is often easy for a potential plaintiff to ascertain. The owner of a debt knows (or should know) the date of the last transaction on an account (or the date of another event that would trigger the running of the limitations period) and can easily ascertain the length of the applicable statute of limitations. That is particularly so when the plaintiff is a debt buyer, which will have previously ascertained the age (and thus the likely enforceability) of a debt in deciding how high a price to pay. See pp. 2-3, *supra*. The owner of a debt is also well-positioned to assess whether there exists any non-frivolous basis (such as tolling) for avoiding an otherwise-applicable limitations bar. Under the rule applied by every court of appeals that has considered the issue, a plaintiff outside the bankruptcy context engages in sanctionable conduct when it knowingly files a time-barred debt-collection suit.

2. The FDCPA makes it unlawful for a debt collector to "use any false, deceptive, or misleading representations or means in connection with the collection of any debt," including by making a "false representation" about "the character, amount, or legal status of any debt." 15 U.S.C. 1692e(2)(A). The FDCPA also prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect a debt." 15 U.S.C. 1692f.

When a debt collector sues or threatens to sue to collect a debt that it knows is time-barred, the debt collector violates the FDCPA. The filing of a suit, or the threat to file a suit, is an implicit representation that the plaintiff has a good-faith basis to believe that the underlying debt is legally enforceable. When a

debt collector knows that the expiration of an applicable limitations period has rendered the debt legally unenforceable, the filing of a suit or the threat to file a suit is a misrepresentation of the "character" or "legal status" of the debt. 15 U.S.C. 1692e(2)(A). Because the FDCPA prohibits representations that are "misleading" as well as statements that are "false," a debt collector's implicit representation that an unenforceable debt is enforceable can violate the FDCPA even if the debt collector does not make an explicit false statement. See *Buchanan* v. *Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015) (Sutton, J.) (explaining that the FDCPA "outlaws more than just falsehoods"). The federal courts that have addressed the issue "have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect time-barred debt." *In re Dubois*, 834 F.3d 522, 527 (4th Cir. 2016), petition for cert. pending, No. 16-707 (filed Nov. 23, 2016); see *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014) (collecting cases), cert. denied, 135 S. Ct. 1844 (2015). As in the Rule 11 context, that is true even though the expiration of a limitations period is an affirmative defense.[7]

When a debt collector knows that a debt is not judicially enforceable, filing or threatening to file a collec-

[7] The FDCPA contains a safe harbor under which a debt collector can avoid liability "if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c); see generally *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010). But when a debt collector who knows that a debt is time-barred initiates or threatens to initiate legal action, it violates the Act.

tion suit also violates the FDCPA's prohibition on using unfair means of collecting a debt. 15 U.S.C. 1692f. In most jurisdictions, a consumer's partial payment on a time-barred debt or a promise to resume payments on such a debt will restart the statute of limitations for the entire amount of the debt—a fact that most consumers are unlikely to know. 2013 FTC Report 47; see Pet. Br. 17. When faced with the threat of legal action to enforce a debt that the consumer may not know is judicially unenforceable, a consumer may offer (or be invited to offer) a small partial payment to forestall judicial action, without knowing the legal consequences of that step. A debt collector thus violates the FDCPA's prohibition on using "unfair" practices when it induces or invites a consumer to remit partial payment for an unenforceable debt by giving the consumer the false impression that the debt is legally enforceable. See *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (debt collector violated FDCPA by sending letter that offered to "settle" debt because that language gave the misleading impression that the debt was legally enforceable); *Ehsanuddin* v. *Wolpoff & Abramson*, No. 06-cv-708, 2007 WL 543052, at *4 (W.D. Pa. Feb. 16, 2007) ("[T]he fact that the statute of limitations defense could be waived by the unsuspecting consumer against whom a lawsuit is filed appears to present the precise situation that the FDCPA was designed to thwart.").

More generally, statutes of limitations "are not simply technicalities," *Board of Regents of the Univ.* v. *Tomanio*, 446 U.S. 478, 487 (1980), but reflect strong public-policy determinations about the unfairness of subjecting an adversary to suit after a speci-

fied period of time, *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Statutes of limitations 'promote justice by preventing surprises through * * * revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'") (quoting *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S 342, 348-349 (1944)). Those policy concerns have particular salience in the consumer-debt context. After the passage of many years, a consumer may not remember, or may lack the documentation needed to prove, the facts establishing a limitations defense. And "even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense." *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). When a debt collector attempts to evade the effect of a statute of limitations with misleading partial truths, the debt collector violates the FDCPA.[8]

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[8] In its opening brief, petitioner does not address whether a debt collector violates the FDCPA by filing or threating to file suit on a debt that the plaintiff knows is time-barred. Petitioner's amicus DBA International, Inc. (DBA) is a trade association representing agencies that purchase debt on the secondary market. DBA Amicus Br. 1-2. DBA operates a certification program that certifies debt-buying companies holding approximately 80% of the purchased debt nationwide. *Id.* at 2. Petitioner is certified under that program. *Id.* at 5. Certification in the program requires certified companies to conform to the program's standards. *Id.* at 2. One of those standards governs the collection of time-barred debt and directs that a "Certified Company shall not knowingly

B. A Debt Collector Violates The FDCPA When It Files A Proof Of Claim In Bankruptcy For A Debt That It Knows Is Time-Barred

As explained above, outside bankruptcy, an attempt to use legal process to enforce a debt that a creditor knows is time-barred can trigger sanctions under Federal Rule of Civil Procedure 11, and it violates the FDCPA if the plaintiff is a "debt collector." Neither the Bankruptcy Code nor the FDCPA suggests that a different rule should apply in bankruptcy. A creditor that knowingly files a proof of claim for a time-barred debt can be sanctioned under Federal Rule of Bankruptcy Procedure 9011, the bankruptcy counterpart to Rule 11. And, as the court below correctly held, an FDCPA "debt collector" violates the Act if it engages in that conduct.

1. Nothing in the Bankruptcy Code authorizes enforcement of a time-barred claim

Petitioner argues (Br. 18-22) that a creditor has a "right" or "entitle[ment]" to file a proof of claim for a debt that the creditor has no good-faith basis to believe is judicially enforceable. Petitioner relies on the Code's statement that a creditor "may file a proof of claim," 11 U.S.C. 501(a), and on its provision of a mechanism for disallowing claims that cannot be enforced in bankruptcy, 11 U.S.C. 502(b)(1). Recognition of such a "right" would subvert the careful claim-sifting process that is critical to the proper administration of bankruptcy cases.

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bring or imply that it has the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations, even if state law revives the limitations period when a payment is received after the expiration of the statute." *Id.* at 3 (citation omitted).

a. Section 501 of the Code states that "[a] creditor * * * may file a proof of claim." 11 U.S.C. 501(a). Contrary to petitioner's argument, however, that generalized permission does not speak to the specific question whether a creditor may legitimately file a proof of claim for a debt that it knows is time-barred. "In expounding [on] a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 221 (1986)) (citations omitted). "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (citation omitted).

Section 501(a) is simply one element of the larger claim-sifting process in bankruptcy. As petitioner acknowledges (Br. 19), other Code provisions are designed to ensure that time-barred claims are *not* paid. Section 502(b) of the Code states that a claim "shall" be "allow[ed]" *unless* "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. 502(b)(1). A time-barred claim is "unenforceable against the debtor and property of the debtor[] under * * * applicable law," *ibid.*, and petitioner recognizes (Br. 19) that such a claim should be "disallowed, with the result that it will not be paid by the estate." See 11 U.S.C. 558 (providing that a bank-

ruptcy "estate shall have the benefit of any defense available to the debtor * * * , including statutes of limitations"); *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 739 (7th Cir. 2016) (Wood, C.J., dissenting) (explaining that, when the statute of limitations on a debt expires, "the bankruptcy process is one of the avenues of collection that" is "close[d] off for the creditor"), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). That approach is consistent with the bedrock bankruptcy-law principle that "[p]roperty interests are created and defined by state law," *Butner* v. *United States*, 440 U.S. 48, 55 (1979), which, *inter alia*, typically defines the period of time during which a debt will remain enforceable.

The Code thus reflects Congress's determination that, if a debt is unenforceable outside of bankruptcy, a claim for that debt should be disallowed in bankruptcy as well. Petitioner emphasizes (Br. 17-18) that it has a right to payment on its claim, even if the only available means of collection is to ask the debtor for voluntary repayment. But a proof of claim submitted in a bankruptcy case "is no mere request on moral grounds to turn money over from the bankruptcy estate to the claimant: it is a legal mechanism through which the payment of the claim can be compelled, if the claim is not disallowed by the bankruptcy court." *Owens*, 832 F.3d at 739 (Wood, C.J., dissenting). Submission of a proof of claim therefore is properly understood, not simply as a representation that the debtor is morally obligated to pay a particular sum, but as a representation that the creditor has a good-faith basis to believe that it is entitled to payment under applicable bankruptcy and non-bankruptcy law. Nothing in the Code suggests that a creditor may

legitimately submit a proof of claim that it knows is subject to disallowance under the Code.

Petitioner argues (Br. 18-19) that a claim for a time-barred debt is unenforceable in bankruptcy only when a trustee or other party in interest objects to a proof of claim. As explained above, however, federal courts have consistently held (and petitioner's opening brief does not dispute) that a plaintiff who knowingly files a time-barred suit can be sanctioned for litigation misconduct, even though the statute of limitations is an affirmative defense. See pp. 11-13, *supra*. Nothing in the Code suggests that Congress intended to be more solicitous of time-barred claims in the bankruptcy context. Rather, inside as outside bankruptcy, the propriety of invoking judicial process to enforce a debt depends on whether the creditor has a good-faith basis to believe that the debt is judicially enforceable.

b. When a creditor files a proof of claim in bankruptcy seeking to enforce a debt the creditor knows is time-barred, that filing may trigger sanctions under Federal Rule of Bankruptcy Procedure 9011. Like Federal Rule of Civil Procedure 11, Rule 9011 states that, "[b]y presenting to the court" any "paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, * * * the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Bankr. P. 9011(b)(2). Federal Rule of Bankruptcy Procedure 3001(f) provides that "[a] proof of claim executed and filed in conformance with these rules shall constitute prima

facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Thus, when a creditor (or its attorney) files a proof of claim, it implicitly represents that the underlying claim is "valid[]," *ibid.*, and enforceable in bankruptcy. Such a certification is not "warranted by existing law," Fed. R. Bankr. P. 9011(b)(2), when the creditor knows that the claim is time-barred because the Code specifically provides that time-barred claims should be disallowed.

Petitioner contends (Br. 18-19) that, by providing a mechanism for objecting to and disallowing time-barred claims, the Code affirmatively "*invites* claims for time-barred debts to be brought into the bankruptcy process" even when the persons who submit them lack any good-faith basis for believing them to be timely. Br. 19 (emphasis added). That is incorrect. In bankruptcy, as in ordinary civil litigation, a limitations bar is an affirmative defense that may be waived if it is not promptly asserted. But Rule 9011 requires in bankruptcy what Rule 11 requires in other civil-litigation contexts: that parties and attorneys forbear from seeking to enforce claims that they know are time-barred. See pp. 11-13, *supra*.

Petitioner also invokes (Br. 5, 12, 20) Federal Rule of Bankruptcy Procedure 3001, which specifies the particular facts that must be included in a proof of claim for a consumer debt, including the date of the account holder's last transaction, the date of the last payment on the account, and the date the account was charged to profit and loss. Fed. R. Bankr. P. 3001(c)(3)(A). Petitioner contends (Br. 20) that, by requiring each proof of claim to include that information, which helps debtors and others to identify and object to time-barred claims, the rules "authorize the

filing of proofs of claim for time-barred debts." That is a non sequitur. The fact that the bankruptcy rules contain other protective measures, designed to reduce the likelihood that time-barred claims will be improvidently allowed, does not suggest that the deliberate filing of such claims is a legitimate bankruptcy practice.

Petitioner relies (Br. 20-21, 28) on a proposed amendment to Rule 3001 that the Advisory Committee on Bankruptcy Rules (Advisory Committee) considered and rejected in 2009. The amendment would have required creditors to affirmatively state in a proof of claim that the claim is timely under the relevant statute of limitations. As petitioner notes (Br. 20-21), the Advisory Committee instead chose to require the disclosure of information that would allow debtors and trustees to more easily ascertain whether a particular claim is time-barred. See Advisory Comm., *Meeting of March 26-27, 2009, San Diego, California, Agenda* 87 (Mar. 26-27, 2009) (*Advisory Committee Agenda*).[9]

In explaining its rejection of the proposed amendment, however, the Advisory Committee emphasized "the need for claimants to properly investigate their claims before filing proofs of claim"; noted that "Rule 9011 imposes an obligation on a claimant to undertake an inquiry reasonable under the circumstances to determine to the best of the claimant's knowledge, information, and belief that a claim is warranted by existing law and the factual contentions have evidentiary support"; and suggested that the proof-of-claim form be amended to require a declaration under pen-

[9] http://www.uscourts.gov/sites/default/files/fr_import/BK2009-03.pdf.

alty of perjury that the information provided is correct. *Advisory Committee Agenda* 87. Although the Advisory Committee acknowledged that requiring such a declaration would "not address[] the statute of limitations issue," the Committee noted that the declaration "would impress upon the claimant the importance of ensuring the accuracy of the information provided." *Ibid.* When Congress enacted the 1978 Code, the House Report explained that Section 501 "is permissive only" and "permits filing *where some purpose would be served.*" S. Rep. No. 989, 95th Cong., 2d Sess. 61 (1978) (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977) (same). No valid bankruptcy purpose is served when a creditor invokes judicial process to attempt to collect an unenforceable debt.

2. The FDCPA's bans on misleading representations and unfair practices prohibit debt collectors from filing proofs of claim in bankruptcy on debts they know are time-barred

a. By filing a proof of claim, a debt collector implicitly represents that it has a good-faith basis to believe that the claim is enforceable in bankruptcy. That understanding is reinforced by the Code and Rule provisions that "deem[]" any underlying claim "allowed" absent an objection, 11 U.S.C. 502(a); that declare a proof of claim to be prima facie evidence of the validity of the underlying claim, Fed. R. Bankr. P. 3001(f); and that require a certification that the claim is "warranted by existing law," Fed. R. Bankr. P. 9011(b)(2). When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA. By representing

that a time-barred debt is enforceable in bankruptcy, a debt collector mischaracterizes "the character" and the "legal status" of the debt, in violation of 15 U.S.C. 1692e(2)(A).

Petitioner asserts (Br. 27-28) that its proof of claim was "accurate with regard to the 'legal status' of the debt" because it "contained all the information required by Bankruptcy Rule 3001." But the FDCPA prohibits not only false representations, but also *misleading* representations. The inclusion of both prohibitions in the same provision demonstrates that the statue bans some representations that are factually accurate but are likely to mislead the relevant audience. Such a practice is also "unfair" within the meaning of the FDCPA because a creditor that knowingly files a proof of claim for a time-barred debt seeks money that it can obtain only if the bankruptcy system fails to operate as Congress intended. A debt collector that attempts to game the system by hoping that the debtor and trustee will fail to notice or assert an ironclad affirmative defense (and by requiring a debtor or trustee to expend energy and resources to identify and assert a limitations defense that the creditor is already aware of) engages in the type of abusive conduct the FDCPA is intended to prohibit.

b. Petitioner argues (Br. 29) that, unlike the typical debt-collection communication, which is directed to an individual consumer debtor, its proof of claim was directed to respondent's attorney and the Chapter 13 trustee. While recognizing (*ibid.*) that courts generally analyze whether particular conduct violates the FDCPA's prohibition on misleading representations by asking whether an unsophisticated consumer would be misled, petitioner urges this Court to adopt a dif-

ferent "competent attorney" standard with respect to bankruptcy proofs of claim. That argument ignores the fact that many bankruptcy filers are unrepresented. But in any event, this Court need not decide whether an unsophisticated-consumer or competent-attorney standard applies to a debt collector's proof of claim. Cf. *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1602 n.6 (2016) (declining to decide whose perspective is relevant in assessing whether a representation is misleading). Filing a proof of claim constitutes an implicit representation that there is a good-faith basis to believe the claim is enforceable in bankruptcy and "is warranted by existing law." Fed. R. Bankr. P. 9011(b)(2). A debt collector's submission of a proof of claim for a debt that the creditor knows is time-barred therefore is misleading under either an unsophisticated-consumer or competent-attorney standard.

c. Petitioner argues (Br. 31-34) that knowingly filing a proof of claim for a time-barred debt is not "unfair" under the FDCPA because the Code both establishes mechanisms to oppose untimely claims and affords various other protections to debtors in bankruptcy. Petitioner also suggests (Br. 37-38) that, at least in a case (like this one) where the debtor or trustee has successfully objected to the underlying proof of claim, any FDCPA suit represents an inappropriate attempt by "plaintiffs' lawyers" to profit from "technical violations" of the Act. Those arguments lack merit.

The Code instructs that, "if a purpose would be served," the trustee should "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); see Pet. Br. 29-30. Numerous courts have recognized, however, that trustees cannot realistically be expected to identify every time-

barred (or otherwise unenforceable) claim filed in every bankruptcy. See, *e.g.*, *In re Edwards*, 539 B.R. 360, 365 (Bankr. N.D. Ill. 2015) ("In districts like this with a large number of chapter 13 cases, * * * trustees typically object to claims only if they are filed after the claims bar date or improperly seek priority treatment.") (footnote omitted); see also *Owens*, 832 F.3d at 740 (Wood, C.J., dissenting); *In re Feggins*, 540 B.R. 895, 901 n.5 (Bankr. M.D. Ala. 2015), aff'd, *LVNV Funding, LLC* v. *Feggins*, No. 15-cv-893, 2016 WL 4582061 (M.D. Ala. Sept. 2, 2016). And even apart from the costs imposed when particular time-barred claims are improvidently allowed, the large-scale submission of such claims (see pp. 26-27, *infra*) diverts trustee resources from other tasks and thus hinders the administration of the bankruptcy system. A trustee's separate obligation to object to invalid claims therefore does not negate a creditor's duty to refrain from filing claims it knows are legally unenforceable.

That is particularly so because the knowing submission of a proof of claim for a time-barred debt represents a deliberate effort to exploit the imperfections of the alternative safeguards that petitioner identifies. A creditor that submits such a claim can gain a practical advantage only if the claims-allowance process fails to operate as Congress intended. A creditor that files a claim for a time-barred debt thus is "exploiting a weakness in the bankruptcy system and preying on potential error to collect debts where it should not." *In re Dubois*, 834 F.3d at 535 (Diaz, J., dissenting).

Such time-barred claims are often submitted, moreover, by companies whose business model depends on the legal unenforceability of the relevant

debts. The "business of buying stale claims and filing proofs of claim in bankruptcy to collect on them * * * appears to be a big and prosperous business." *In re Edwards*, 539 B.R. at 365. Debt buyers are able to purchase time-barred debt for pennies on the dollar precisely because all parties to that transaction know that the debt is unenforceable. And, given the low cost of acquiring such debt, the large-scale submission of proofs of claim in bankruptcy may be profitable even if most such claims are objected to and disallowed. Each knowing submission of a time-barred claim should be recognized for what it is: a deliberate effort to collect a legally unenforceable debt through an implicit misrepresentation that the debt remains enforceable. Such submissions are much more than "technical violations" (Pet. Br. 37) of the FDCPA, even in instances where a timely objection prevents the creditor from achieving its illicit aim.[10]

Petitioner also asserts that filing a proof of claim for a time-barred debt does not implicate the FDCPA's consumer-protection purposes because allowance of such a claim "will ordinarily have no effect on the debtor" (Br. 35), but instead "primarily affects the interests of other creditors" (Br. 36).[11] In

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[10] The government recently sued one of petitioner's amici, Resurgent Capital Services, L.P. (Resurgent), for abuse of process under 11 U.S.C. 105(a). The complaint alleges that, over a six-year period, Resurgent filed more than 142,000 proofs of claim for debts, some dating back to the 1980s, that it knew were time-barred and on which it collected more than $12 million. *In re Davis*, No. 14-20400-DRD13, Adv. No. 16-2018, at ¶¶ 36-37, 41 (Bankr. W.D. Mo.); see also *In re Freeman-Clay*, No. 14-41871-DRD13, Adv. No. 16-4102 (Bankr. W.D. Mo.).

[11] Amicus United States Chamber of Commerce contends (Br. 23) that the FDCPA does not apply to proofs of claim because a

many circumstances, however, allowance of a time-barred claim can harm a Chapter 13 debtor. If a Chapter 13 plan provides for 100% recovery for unsecured creditors, payment of a time-barred claim will take money directly from the debtor. If (as occurs in many Chapter 13 cases) a case is dismissed before completion of the plan, some amount of money from the portion of the debtor's disposable income that is dedicated to payments under the plan will have gone to pay the time-barred claim rather than to pay valid claims. When the bankruptcy fails, the debtor will consequently owe more on the valid claims than he would have if the invalid claim had not been included in the bankruptcy.

Even if a plan succeeds, moreover, payments made to time-barred creditors will reduce payments to any unsecured creditors whose claims are not discharged. In this case, for example, a majority of respondent's unsecured debt was more than $50,000 in student-loan obligations. Bankr. Ct. Doc. 1, at 17-18 (Dec. 7, 2012). If petitioner's claim had been allowed, any payments made on that claim would have reduced the amount of student-loan debt respondent repaid, thereby increasing the post-bankruptcy principal and interest respondent would still owe on that nondischarged debt after bankruptcy. See 11 U.S.C. 523(a)(8), 1328(a)(2). Petitioner is therefore wrong in arguing (Br. 36 n.7)

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proof of claim is an attempt to collect a debt from the bankruptcy estate and (in the amicus's view) the FDCPA "regulates attempts to collect financial obligations only from natural persons." That is incorrect. The relevant FDCPA prohibitions are not limited to communications made directly to consumers. Rather, they apply to "any * * * representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and to any "means to collect or attempt to collect any debt," 15 U.S.C. 1692f.

that respondent would not have suffered any harm if petitioner's claim had been allowed.

Equally meritless is petitioner's suggestion (Br. 31-32) that the availability of sanctions under Rule 9011 is sufficient to deter the type of behavior the FDCPA is designed to prohibit. Like its civil counterpart, Rule 9011 contains a safe haven that prohibits the imposition of sanctions if an offending paper is "withdrawn" within 21 days after a motion for sanctions is filed. Fed. R. Bankr. P. 9011(c)(1). A debt collector therefore can adopt a business model of filing multiple proofs of claim for time-barred debts, anticipating that some will be improvidently allowed and intending to withdraw the rest as soon as objections are raised, without incurring any risk of sanctions under Rule 9011.

In sum, filing a proof of claim for a debt that a debt collector knows is time-barred serves no valid bankruptcy purpose, undermines the claims-sifting process established by Congress, and violates the FDCPA. As one court of appeals judge has explained:

> At best, a debt collector who files such a claim wastes the trustee's time. At worst, the debt collector catches the trustee asleep at the switch and collects on an invalid claim to the detriment of other creditors and, in many cases, the debtor. In either case, the debt collector misleadingly represents to the debtor that it is entitled to collect through bankruptcy when it is not.

In re Dubois, 834 F.3d at 534 (Diaz, J., dissenting).

3. The Bankruptcy Code does not preclude application of the FDCPA to bankruptcy proofs of claim

Petitioner argues (Br. 38) that, "[e]ven if the FDCPA could be read to prohibit the filing of a proof of claim for an unextinguished time-barred debt, the Bankruptcy Code would preclude that application of the FDCPA." See Br. 38-45. Petitioner contends (Br. 43-45) in the same vein that Congress's enactment of the Code in 1978 effected an implied repeal of any such prohibition that the FDCPA might previously have imposed. Those arguments lack merit.

a. To a large extent, petitioner's preclusion and implied-repeal arguments rest on the same mistaken premise that underlies petitioner's contention that the knowing submission of a proof of claim for a time-barred debt is not "misleading" or "unfair" within the meaning of the FDCPA. Thus, petitioner contends that, "[i]f interpreted to prohibit filing a proof of claim for an unextinguished time-barred debt, the FDCPA would patently conflict with the Code, *which expressly authorizes that very practice.*" Br. 40 (emphasis added). As explained above, the italicized language reflects a misunderstanding of the Bankruptcy Code and Rules, which prohibit all creditors from filing proofs of claim for debts they know are time-barred. See pp. 17-23, *supra*. Treating the conduct alleged in this case as an FDCPA violation therefore would not penalize petitioner for actions that the Code authorizes or encourages, or otherwise create any conflict between the Act and the Code.

b. Petitioner also suggests (Br. 40) that, even if the knowing submission of a proof of claim for a time-barred debt is properly viewed as an abuse of the bankruptcy process, the only remedies for such abuse

are those established by the bankruptcy laws themselves. Thus, petitioner argues (*ibid.*) that treating the conduct alleged here as an FDCPA violation would "substitute the FDCPA's broader remedies in place of the Code's own carefully calibrated ones and supplant the authority of bankruptcy courts to police conduct occurring within a bankruptcy proceeding." Relying on *Kokoszka* v. *Belford*, 417 U.S. 642, 651 (1974), petitioner contends that the FDCPA should not be construed to apply to the actions a debt collector takes in a bankruptcy case because "[n]othing in the text or legislative history reflects any intent to interfere with the 'delicate balance' of the bankruptcy system." Br. 41 (quoting *Kokoszka*, 417 U.S. at 651). Those arguments are misconceived.

The FDCPA prohibitions at issue here apply only to creditors that fall within the Act's definition of "debt collector." Those prohibitions govern, *inter alia*, the "representation[s]" that debt collectors may make "in connection with the collection of any debt," 15 U.S.C. 1692e, and the "means" they may use "to collect or attempt to collect any debt," 15 U.S.C. 1692f. By its plain terms, that language encompasses efforts by FDCPA debt collectors to invoke judicial processes in the course of their debt-collection efforts. See *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings.") (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

Consistent with that understanding, the courts of appeals that have addressed the question have consistently held that a debt collector violates the FDCPA if it initiates a civil suit to collect a debt it

knows is time-barred. See p. 14, *supra*. That is so even though additional remedies (such as Rule 11 sanctions) for the same litigation misconduct may be available in the underlying debt-collection suit. And petitioner's opening brief does not dispute the general proposition that the FDCPA can apply to litigation-related misconduct committed by debt collectors.

Petitioner identifies no sound reason to treat bankruptcy litigation as an exception to that general rule. When a debt collector files a proof of claim in bankruptcy, it attempts "to obtain payment" of a debt by "legal proceedings." *Heintz*, 514 U.S. at 294. Petitioner's argument would logically imply that, even if a debt collector's proof of claim affirmatively misstates the facts bearing on a potential limitations (or other) defense, the FDCPA should be displaced in deference to the purportedly exclusive remedies provided by the Code and Bankruptcy Rules. Nothing in the Code suggests that Congress intended such an exception to the rules that generally govern debt collectors' conduct.

The effect of the court of appeals' decision in this case is simply to make additional remedies available when a particular type of creditor (an FDCPA debt collector) commits a type of bankruptcy abuse (the filing of a proof of claim for a debt the creditor knows is time-barred) that is forbidden to all creditors. Imposition of such additional remedies on a class of creditors that the FDCPA singles out for targeted regulation is fully consistent with the text and purposes of both the Act and the Code. And "[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the

operation of the other." *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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