No. 14-858

In The
Supreme Court of the United States

LVNV FUNDING, LLC; RESURGENT CAPITAL SERVICES, L.P.; AND PRA RECEIVABLES MANAGEMENT, LLC,

Petitioners,

v.

STANLEY CRAWFORD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF BECKET & LEE, LLP, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Becket & Lee, LLP is a law firm specializing in the protection and enforcements of the rights of creditors and has maintained a national-based practice for more than thirty years. Its interest in the instant petition is founded upon its representation of numerous unsecured claimants in bankruptcy, and its role as an entity that files proofs of claims on behalf of numerous creditors in every United States Bankruptcy Court.

The decision of the United States Court of Appeals for the Eleventh Circuit will have a broad and harmful impact on the processing of claims in bankruptcy, largely from the court's application of the proscriptions of the Fair Debt Collection Practices Act to proofs of claims properly filed pursuant to the Bankruptcy Code. Were the decision below to stand, the filing of proofs of claims would trigger conflicting and inequitable application of the two statutory regimes.

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Consent to the filing of this brief is granted by blanket consents by the parties pursuant to Sup. Ct. R. 37.2(a). Counsel of record for all parties received notice, at least ten days prior to the due date of this brief, of *amicus curiae*'s intention to file this brief.

SUMMARY OF ARGUMENT

To participate in any possible distribution from the estate in bankruptcy, a creditor must file a claim. Fed. R. Bankr. P. 3002. The Bankruptcy Code and the related procedural rules which regulate the filing of a proof of claim, are broad, and do not delimit claims for debts for which the applicable statute of limitations may have run.

The Eleventh Circuit, in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), by placing the mere filing of a proof of claim against an estate in bankruptcy within the ambit of collection of a debt for purposes of the Fair Debt Collection Practices Act's ("FDCPA") proscription against harassing or abusive practices, 15 U.S.C. § 1692d, false, deceptive, or misleading representations, 15 U.S.C. § 1692e, or unfair or unconscionable means of collection, 15 U.S.C. § 1692f, imposes an additional procedural regime which is disparate in its treatment of various bankruptcy claimants as well as in various jurisdictions, conflicts with the broad scope of the bankruptcy law and rules, and will clearly operate inequitably on a discreet subset of bankruptcy claimants.

Moreover, the Eleventh Circuit's reasoning and holding will also ensnare non-debt collector creditors who engage the services of outside entities, such as *amicus*, to assist them in the administration of their bankrupt accounts. It is conceivable that such outside parties would refuse to file claims which subject them to FDCPA liability, thereby forcing creditors either to

abandon out of statute claims, or to process and file the claims themselves.

ARGUMENT

Bankruptcy is a legal proceeding most commonly initiated by the debtor. To participate in any possible distribution from the estate in bankruptcy, an unsecured creditor must file a claim. Fed. R. Bankr. P. 3002.

I. Statute and rule distinguish a proof of claim from its underlying debt, and treat them differently.

The filing of a proof of claim is authorized by the Bankruptcy Code and is not limited to "in statute" debts. A claim in bankruptcy is 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).

> Legislative history confirms that Congress intended the broadest definition for "claim" in bankruptcy. The House Report explains: "By this broadest possible definition. . . . the bill contemplates that all legal obligations of the debtor, *no matter how remote or contingent,* will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy

> court." H.R. REP. NO. 595, 95th Cong., 2d Sess. 309 (1979) [sic] *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266 (emphasis added).

Roach v. Edge (*In re Edge*), 60 B.R. 690, 692 (Bankr. M.D. Tenn. 1986).

The fact that a claim may be subject to disallowance due to the running of an applicable statute of limitations, 11 U.S.C. § 502(b)(1), "does not defeat the *existence* of the claim in bankruptcy," *Roach*, 60 B.R. at 699. "Quite the contrary: the existence of the claim must be determined independent of limitations questions else the process of *allowance* under § 502 becomes redundant if not circular." *Id.*

The running of a statute of limitations, a debtor's affirmative defense to a suit on a debt, Fed. R. Civ. P. 8(c)(1), rarely extinguishes the debt. *See*, *e.g.*, *Buchanan v. Northland Group, Inc.*, No. 13-2523, 2015 U.S. App. LEXIS 517, at *6 (6th Cir. Jan. 13, 2015); *Matos v. Bank of N.Y.*, No. 14-21954-CIV-MORENO, 2014 U.S. Dist. LEXIS 102459, at **8-9 (S.D. Fla. 2014); *Roberts v. Bennett*, 709 F. Supp. 222, 224 (N.D. Ga. 1989); *In re Hess*, 404 B.R. 747, 749-50 (Bankr. S.D.N.Y. 2009); *Keeler v. PRA Receivables Mgmt., LLC* (*In re Keeler*), 440 B.R. 354, 365 (Bankr. E.D. Pa. 2009) ("Thus, Pennsylvania law appears to be consistent with the law of other jurisdictions. A debt barred by the statute of limitations is not extinguished; rather, it is subject to an affirmative defense that can be waived."). It will merely limit the

creditor's remedy if properly raised by the debtor. *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008) ("Consequently, a proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense is raised in a filed objection.").

It would do harm to the elaborate scheme enacted by Congress in the Bankruptcy Code, and unfairly treat a distinct subset of claimants, *viz*., those defined by the FDCPA as debt collectors, to force them to make a pre-filing determination beyond the verification of the existence of the debt obligation that their claims may be subject to a defense because the underlying obligations are beyond the state's statute of limitations in order to avoid FDCPA liability.[2] The provisions of 11 U.S.C. § 502 provide the debtor a streamlined process to determine allowance of bankruptcy claims and correctly align the burdens in accordance with law.[3] Thus if a debtor chooses, he may

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[2] Indeed, such a requirement would arguably force a non-attorney claimant who executes the proof of claim form into the unauthorized practice of law, by forcing him to determine if the statute of limitations has passed, arguably a legal determination. *See*, *e.g.*, *Fla. Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996) (finding the unauthorized practice of law by nonlawyer employees who wrote letters to a client that contained legal advice, *viz.*, statute of limitations applicable to a client's claims, that only a lawyer can give).

[3] At least one court has recently failed to recognize this. The United States Bankruptcy Court for the Northern District of Indiana sanctioned Petitioner, pursuant to Fed. R. Bankr. P. 9011, for filing a proof of claim for an "out of statute" debt, and

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raise the affirmative defense of statute of limitations to a claim. However, neither the debtor nor any other party in interest is required to object to claims that are out of statute and, unchallenged, such claims are entitled to distributions from the bankruptcy estate.[4] 11 U.S.C. § 502(a). Indeed, a debtor may voluntarily repay an out of statute debt outside of bankruptcy. *Buchanan*, No. 13-2523, 2015 U.S. App. LEXIS 517, at *6 ("Legal defenses are not moral defenses, however."). In any event, the debt still exists; it is only a creditor's threat, or filing, of suit that has been held to be violative of the FDPCA's prohibition against unfair or false or misleading practices.

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assessed a $1,000.00 fine, (adopting, for lack of any showing of harm to the debtor, an FDCPA sanction as a guideline). *In re Sekema*, No. 14-40145, 2015 Bankr. LEXIS 239, at **1-8 (Bankr. N.D. Ind. Jan. 7, 2015). Despite the utter and complete absence of any basis in bankruptcy law or rule to bar the *filing* of claim (*vis-à-vis* its *allowance*) for an out of statute debt, the court replaced the debtor's burden of asserting an affirmative defense with a claimant's duty to research proactively any defenses available to the debtor, and effectuate them regardless of his wishes. *Id*.

[4] For instance, in a bankruptcy where creditors are paid less than the full amounts of their claims, a debtor is indifferent as to the distributions made by the trustee, and will eschew the expense of litigating the claims (unless the disallowance of a claim will provide no return to the debtor after all allowed claims are paid). In such a situation of less than 100 percent payout, it would be the creditors who would be incentivized to police each other, rather than the debtor.

Thus did, very recently, Hon. Eugene R. Wedoff, United States Bankruptcy Court for the Northern District of Illinois, opine:

> The FDCPA sets out no prohibition against a debt collector pursuing collection of a debt subject to a limitation defense. Rather, it prohibits improper collection activity in the general categories cited in the complaint: false representations (§ 1692e(2)(A)), threats of illegal action (§ 1692e(5)), and deceptive means of collection (§ 1692e(10)), as well as "unfair or unconscionable" collection methods (§ 1692f).

LaGrone v. LVNV Funding LLC (*In re LaGrone*), Adv. No. 14 A 00578, No. 13 B 21423, 2015 Bankr. LEXIS 212, at *14 (Bankr. N.D. Ill. Jan. 21, 2015).

In dismissing the complaint before him, Judge Wedoff concluded that filing a proof of claim on a debt subject to a limitation defense is no violation of these provisions. *Id*. Furthermore, he recognized a fundamental distinction between a defendant in a civil collection action and a debtor invoking bankruptcy relief. He noted that "a debtor in bankruptcy is not in the position of a consumer facing a collection lawsuit," and "there is no reason to interpret the FDCPA as having the same effect on bankruptcy claims that it has on civil actions." *Id*. at *19.

Moreover, the most recent revision to Fed. R. Bankr. P. 3001 requires open-end or revolving consumer credit claims to include the following information: the name of the entity from whom the

creditor purchased the account; the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account; the date of an account holder's last transaction; the date of the last payment on the account; and the date on which the account was charged to profit and loss. Fed. R. Bankr. P. 3001(c)(3)(A). It also allows a debtor to request additional documentation from the creditor, which must be provided within thirty days. Fed. R. Bankr. P. 3001(c)(3)(B). The Advisory Committee Notes to the rule state:

> Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. *It will also provide a basis for assessing the timeliness of the claim*."

Fed. R. Bankr. P. 3001, Advisory Committee Notes, 2012 Amendments (emphasis added). It is just such detail that led the United States District Court for the Northern District of Illinois to conclude that a compliantly filed proof of claim, albeit for time-barred debt, "is not automatically improper," "is a neutral statement that a debt existed at a certain time and is now owned by the claimant," and, consequently, no violation of 15 U.S.C. § 1692e. *Robinson v. eCAST Settlement Corp.*, No. 14 CV 8277, 2015 U.S. Dist. LEXIS 12700, at **9-10 (N.D. Ill. Feb. 3, 2015)

(dismissing complaint alleging that the filing of a proof of claim for time-barred debt is a false, deceptive, or misleading means of collection in violation of 15 U.S.C. § 1692e, but observing, after *Crawford*, a split of authority regarding an FDCPA claim based on a time-barred proof of claim in bankruptcy and citing cases, *id*. at *4).

II. The consequences of the failure to treat distinctively a proof of claim from its underlying debt are manifold, adverse, and unsupportable.

Analogizing the mere filing of a proof of claim against an estate in bankruptcy to a collection suit and placing it within the ambit of collection of a debt for purposes of the FDCPA's proscription against harassing or abusive practices, 15 U.S.C. § 1692d, false, deceptive, or misleading representations, 15 U.S.C. § 1692e, or unfair or unconscionable means of collection, 15 U.S.C. § 1692f, imposes additional procedural obligations inequitably on a discreet subset of bankruptcy claimants, who, consequently, must attempt to reconcile not only disparately purposed statutory regimes but also conflicting requirements among jurisdictions. *Crawford* imperils a proper bankruptcy claimant who is defined by the FDCPA as a debt collector, 15 U.S.C. § 1692a, while sparing others who file identical proofs of claims but are not so defined (*e.g.*, consumer lender, claimant of non-consumer debt, non-debt collector claimant).

Further, while non-debt collector claimants in bankruptcy are exempt from the reach of the FDCPA, the Eleventh Circuit's reasoning and holding will nevertheless ensnare those who assist non-debt collector creditors in the administration of their bankrupt accounts, particularly by filing their proofs of claims.[5] It is unlikely that such outside parties would agree to file claims which subject them to FDCPA liability. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 622 (2010) (Kennedy, J., dissenting).

> After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk.

Id.

Many creditors will be forced either to abandon legitimate claims which they would want to be filed by outside entities, such claims as would not face

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[5] *Amicus* is engaged by banks and other financial institutions to manage the complex process of bankruptcy administration, including filing and defending proofs of claims. With remarkable rapidity, after the issuance of the Eleventh Circuit's opinion, *amicus* and a client were served with individual and class actions precipitated by the opinion.

FDCPA liability if filed directly by the creditor, or lose their right to engage counsel of their choice and be compelled to process certain claims themselves. It is inconceivable that the drafters of both the Bankruptcy Code and the Fair Debt Collections Practices Act contemplated such an outcome.

Finally, bankruptcy contains severe criminal and monetary penalties for false or fraudulent proofs of claim, which could be invoked if such a claim was filed.[6] The United States Trustee is tasked with overseeing the bankruptcy system and ensuring that parties operating therein are conforming their activities to the law. There is simply no legal or policy reason to single out "debt collectors," for disadvantaged treatment in bankruptcy cases, by ruling that another federal statute, whose purpose is very different from that of the Bankruptcy Code, makes proofs of claims unlawful for debt collectors to file.

The Eleventh Circuit's decision undermines the carefully balanced provisions of the bankruptcy code and rules, and the decisions of experienced bankruptcy judges and appellate reviewers throughout the country who have ruled on this issue and, thus, should be reviewed.

[6] Bankruptcy Form B 10 Proof of Claim notes the maximum penalties ($500,000 fine, five years' imprisonment, or both) for presenting a fraudulent claim, pursuant to 18 U.S.C. §§ 152, 3571.

CONCLUSION

For the foregoing reasons, and those thoroughly and carefully set forth in Petitioners' January 15, 2015 Petition for a Writ of Certiorari, *amicus curiae* Becket & Lee, LLP fully supports such petition.

Respectfully submitted,

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