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Steven A. Meyerowitz

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Nevada Bankruptcy Court Circumvents *Midland Funding LLC v. Johnson* by Awarding Attorneys' Fees to Debtor

*By Justin F. Paget and Eric Wilson**

In this article, the authors discuss a recent bankruptcy court decision that serves as a warning that filing a proof of claim for time-barred debt may carry consequences other than claim disallowance.

The U.S. Bankruptcy Court for the District of Nevada has awarded attorneys' fees to a debtor under a Nevada fee-shifting statute for objecting to a time-barred proof of claim.¹ The opinion serves as a warning that filing a proof of claim for time-barred debt may carry consequences other than claim disallowance despite the U.S. Supreme Court's recent holding in *Midland Funding, LLC v. Johnson*² that such a filing does not violate the Fair Debt Collection Practices Act ("FDCPA").

Debt buyers and other creditors that may hold or purchase older claims should ensure that they have sufficient procedures in place to screen for time-barred claims in jurisdictions, such as Nevada, that may have fee-shifting statutes on the books.

BACKGROUND

The debtor filed for relief under Chapter 7 of the Bankruptcy Code in September 2017 and subsequently converted her case to Chapter 13 in December 2017.

In February 2018, LVNV Funding, LLC ("LVNV") filed three claims ("Claims") based on debts it had purchased from other creditors. The most recent transaction date for any of the Claims was in 2006. Pursuant to Nevada law, on the petition date, each of the Claims had been unenforceable in Nevada

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¹ *In re Andrade-Garcia*, 627 B.R. 158 (Bankr. D. Nev. 2021).

² *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

for at least seven years. The Chapter 13 trustee did not object to the Claims, but the debtor objected to the Claims in January 2020.

The debtor's objection asserted that the Claims should be disallowed as time-barred and asked the court to award the debtor attorneys' fees pursuant to Section 18.010(2)(b) of the Nevada Revised Statutes ("NRS § 18.010(2)(b)").

NRS § 18.010(2)(b) allows a prevailing party to recover its attorneys' fees if the "opposing party[']s claim] was brought or maintained without reasonable ground or to harass the prevailing party." NRS § 18.010(2)(b) must be "liberally construe[d] . . . in favor of awarding [attorneys'] fees in all appropriate situations . . . to punish for and deter frivolous or vexatious claims . . . because such claims. . . overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

LVNV did not dispute that the Claims were time-barred, but it opposed an award for attorneys' fees, citing *Johnson* in support.

In *Johnson*, the Supreme Court considered whether filing a proof of claim based on a time-barred debt was a violation of the FDCPA. The majority ruled that "filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time-barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice" in the context of the FDCPA.³

BANKRUPTCY COURT'S DECISION

The bankruptcy court sustained the debtor's objection to the Claims. As an initial matter, the court ruled that LVNV had properly filed the Claims and, thus, the Claims were entitled to an initial presumption of validity pursuant to Section 502(a) of the Bankruptcy Code. However, the court disallowed the Claims pursuant to Section 502(b) of the Bankruptcy Code because, as LVNV conceded, the Claims were unenforceable under Nevada law.

The court acknowledged that, unless an agreement or other law provides differently, parties normally bear their own costs under the "American Rule" and that fee shifting was not available under the Bankruptcy Code. But the court found that NRS § 18.010(2)(b) may allow a debtor to recover attorneys' fees for a claim objection resolved pursuant to Nevada law.

The court found that the debtor was a prevailing party for the purposes of NRS § 18.010(2)(b). The court next found that *Johnson* was "readily distin-

³ *Johnson*, 137 S. Ct. at 1415–16.

guishable” because the Debtor’s objection and request for attorneys’ fees did “not rely upon or invoke the FDCPA” but was instead based on NRS § 18.010(2)(b).

The court ultimately concluded that the Claims “implicate[d] each and every one of concerns plainly expressed by” NRS § 18.010(2)(b). Leaving no room for future doubt, the court ruled that “an award shifting the debtor’s objection-related attorneys’ fees to the creditor that filed the stale claim is warranted under NRS 18.010(2)(b)” if:

- A creditor files a proof of claim in the District of Nevada that is patently time-barred at filing under the limitations’ periods imposed by subsections (1)(a), (2)(a), or (2)(b) of Section 11.190 of the Nevada Revised Statutes;
- The bankruptcy trustee does not object to the claim; and
- The debtor successfully objects to the stale claim pursuant to Section 502(b)(1) of the Bankruptcy Code.

CONCLUSION

The court’s decision in *In re Andrade-Garcia* serves as a warning to debt buyers and creditors filing proofs of claim in Nevada. As the court unequivocally stated, the consequence of filing a time-barred claim that is not withdrawn prior to a claim objection will be an award of attorneys’ fees in that jurisdiction. When filing older proofs of claim in Nevada, debt buyers and other creditors should carefully screen their claims and consider the potential consequences of filing time-barred claims in light of the decision.

Whether the decision will be followed in other jurisdictions is unclear. The court in *In re Andrade-Garcia* cited heavily to the dissenting opinion in *Johnson* without giving appropriate weight to the majority’s view and response. Nor did the court analyze whether a proof of claim filed in a Chapter 13 bankruptcy was a type of “claim” contemplated by NRS § 18.010(2)(b).

The *Johnson* majority and most other courts recognize a distinction between a “proof of claim” and a civil suit “claim.” For these reasons, Nevada may prove an outlier, but we might see similar attempts at shifting attorneys’ fees in other jurisdictions.