No. 99-20

In the Supreme Court of the United States

GLORIA ROBINSON, PLAN ADMINISTRATOR OF THE LANDMARK INSURANCE GROUP PLAN, ETC., PETITIONERS

v.

CLOCK TOWER PLACE INVESTMENTS, LIMITED, ET AL.

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

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioners' administrative claim on timeliness grounds.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unpublished, but the decision is noted at 175 F.3d 1013 (Table). The district court's order (Pet. App. 9-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. The petition for a writ of certiorari was filed on June 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Landmark companies developed, owned, and managed a large portfolio of residential golf and resort communities. Clock Tower Place Investments (Clock Tower) was a holding company for the Landmark companies, and Oak Tree Savings Bank was the sole owner of Clock Tower. In October 1991, Clock Tower and its subsidiaries (Debtors) petitioned for Chapter 11 bankruptcy relief. The Office of Thrift Supervision immediately placed Oak Tree in receivership and appointed the Resolution Trust Corporation (RTC) as its receiver. The RTC was statutorily dissolved in 1995, and the Federal Deposit Insurance Corporation (FDIC) became receiver of Oak Tree. See 12 U.S.C. 1441a(m)(1); Pet. App. 4-5.

Petitioner Robinson is the former plan administrator of the Landmark Group Health Insurance Program (Plan). Landmark Land Co., Inc. (Landmark), which is not among the debtors in the bankruptcy proceedings below, established the Plan in the 1980s to pay the health benefits of the Landmark companies. Health benefits under the Plan were paid out of the employers' assets. In October 1991, immediately after the Debtors had filed their bankruptcy petitions, Landmark created a voluntary employees' beneficiary association trust (Trust) in accordance with 26 U.S.C. 501(c)(9) in order to ensure adequate funding for the Plan. Petitioners Carney and Welch served as trustees. The Debtors participated in this Trust, contributing funds to pay the benefits of the participants. The Trust was not established for any investment purpose, but was merely a conduit or "pay-as-you-go" trust to fund health benefit payments as claims were received. See Pet. App. 4-5, 10; FDIC C.A. Br. 7.

Beginning in 1989, Landmark's Benefits Committee decided to pay health benefits to certain allegedly ineligible individuals—primarily golf professionals working under contract for the Landmark companies. Both Robinson and Welch knew of the decision to make those payments; Robinson learned of them in 1989. Before the Trust was created, payments to the allegedly ineligible golf professionals exceeded $700,000, and, shortly after the Trust's inception and the bankruptcy filing, an additional $286,000 was disbursed. Petitioners' claim is that these payments violated the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* (Petitioners are not bringing a claim on behalf of themselves for their own health expenses.) Although Landmark, the initial Plan sponsor, made the payments, petitioners assert that the RTC and the FDIC somehow assumed liability. See FDIC C.A. Br. 7-8, 17-18.

2. In April 1996, several years after the applicable bar dates imposed by the district court, petitioners moved to file a proof of claim in bankruptcy and an administrative claim. Pet. App. 5-6. The district court denied the motion on alternate grounds. First, the court determined that petitioners had not set forth an "administrative claim" under Section 503(b) of the Bankruptcy Code, 11 U.S.C. 503(b), which provides that only "actual and necessary" costs and expenses of the estate may be allowed as administrative expenses. Pet. App. 12. Second, the district court found that the claims were in any event time-barred because petitioners had not established "excusable neglect" under Federal Rule of Bankruptcy Procedure 9006(b)(1) for filing the claims late. Pet. App. 13. Indeed, the court added, petitioners had not even acted in good faith, because, when they eventually did file a claim, they

initiated an adversary proceeding instead of moving to file a proof of claim. See *id.* at 14.

In an unpublished per curiam order, the court of appeals affirmed. Without addressing the district court's primary holding that petitioners had not even filed a valid "administrative claim," the court upheld the district court's alternative holding that petitioners' claims were time-barred. See Pet. App. 6-8.

ARGUMENT

Petitioners contend that the court of appeals "erred in failing to consider the legal significance of the fact" that petitioners did not receive "actual notice" of the bankruptcy proceedings. Pet. i (questions presented). That contention warrants no further review. As an initial matter, this Court generally does not grant certiorari to address an issue that the courts below "fail[ed] to consider," for a court's failure to consider an issue, particularly in an unpublished order, creates no precedent and has no significance beyond the particular case. At bottom, the petition amounts to a simple request for error correction, which is ordinarily an inappropriate basis for seeking certiorari.

Moreover, there is no error to correct. Petitioners do not deny that they had constructive notice of the bankruptcy proceedings and that constructive notice is sufficient for "those with mere conjectural claims." *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 490 (1988). Petitioners' argument rests instead on the factual premise that the Debtors in fact "knew of petitioners' claims" on the date of the bankruptcy filing. Pet. 8. That premise is false: As the district court appears to have recognized, there is no reasonable sense in which the Debtors could be said to have "known" of those claims. See Pet. App. 13. Petitioners

argue (Pet. 6) that such knowledge can somehow be inferred from the mere reference in certain bankruptcy schedules to the ongoing expected liability for funding routine health insurance claims under the Plan. But that argument is unsound. Petitioners, who are no longer administrators or trustees of the Plan or Trust (Pet. App. 10), do not seek payment for their medical expenses, nor does their claim have anything clearly to do with unpaid medical expenses. Instead, petitioners challenge, on obscure legal grounds (see Pet. App. 5, 12), payments the Plan had already made to the golf professionals. Petitioners cite no evidence to rebut the lower courts' implicit conclusion that the Debtors did not in fact "know" that such a claim would be brought.

As this Court has stated, not "everyone who may conceivably have a claim [is] properly considered a creditor entitled to actual notice. * * * [I]t is reasonable to dispense with actual notice to those with mere conjectural claims." *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490 (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Despite petitioners' factbound suggestion to the contrary, their underlying claim below was sufficiently "conjectural" that actual notice was unnecessary, and that fact alone distinguishes this case from those upon which they now rely. See Pet. 8-13 (citing, *inter alia*, *New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953), and several court of appeals cases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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