NO. 05-735

IN THE
Supreme Court of the United States

GARRY IOFFE,
Petitioner,

v.

SKOKIE MOTOR SALES, INC.,
doing business as Sherman Dodge,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

PETITIONER'S REPLY

Respondent Sherman Dodge urges the Court to deny review for two basic reasons. First, although Sherman Dodge acknowledges a direct conflict between the Seventh and Eleventh Circuits on the question presented, it maintains that the Court should not resolve the conflict because, after other circuits weigh in, the conflict may resolve itself without a decision from this Court. Second, Sherman Dodge maintains that because consumers who have suffered the same or similar harms as those alleged by Mr. Ioffe can pursue claims under state consumer protection laws, this Court need not consider the direct conflict that has developed under federal law. Both arguments are premised on a misunderstanding of the relevant circumstances and neither provides a reason to deny review.

A. The Circuit Conflict Should Be Resolved Now.

Sherman Dodge does not deny that the Eleventh and Seventh Circuits are in direct conflict on the question presented and that if Mr. Ioffe's case had been filed in a district court within the Eleventh Circuit, his complaint would have stated a claim for damages for violation of the title-disclosure requirements of 49 C.F.R. § 580.5(c). In support of its assertion that the Court should decline to resolve the conflict, Sherman Dodge speculates that the Eleventh Circuit may reject its recent plain-language holding on the meaning of "intent to defraud" under 49 U.S.C. § 32710(a), see Owens v. Samkle Auto. Inc., 425 F.3d 1318 (11th Cir. 2005), and adopt the Seventh Circuit's view that § 32710(a)'s text silently includes a requirement that the seller's deception concern the vehicle's mileage. There is no basis for such speculation.

The precedent established by the unanimous panel decision in Owens may only be overruled by the

Eleventh Circuit sitting en banc. See, e.g., United States v. Petho, 409 F.3d 1277, 1280 (11th Cir. 2005). En banc review is very rare in the Eleventh Circuit, as it is nationally.[1] Nor can it be said that en banc review is relatively more likely here because the Eleventh Circuit in Owens did not fully consider the arguments that were accepted by the Seventh Circuit below. To the contrary, Owens carefully reviewed both the textual and policy justifications for the decision below and rejected them as at odds with the plain language of 49 U.S.C. § 32710(a) and the purposes of the Motor Vehicle Information and Cost Savings Act (MVICSA or the Act). Owens, 425 F.3d at 1321 & n.4, 1322-25; see Petition 9-10, 13-15.

Similarly, because of the directness of the circuit conflict and the Seventh and Eleventh Circuits' full airing of the issues, Sherman Dodge is wrong to suggest that this Court should not consider the question presented until other circuits have added to the confusion. Moreover, as explained in the petition (at 15-16), the circuit split in this case has national impact because of the mobility of vehicles and, thus, the likelihood that used vehicles in the hands of resellers will migrate to jurisdictions in which federal law is more favorable to dealers. Sherman Dodge does not deny this reality or respond to the specific evidence

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[1] See Administrative Office of the U.S. Courts, "Judicial Business of the United States Courts 2004," Supplemental Table S-1, available at http://www.uscourts.gov/judbus2004/tables/s1.pdf (of 3,104 Eleventh Circuit appeals terminated on the merits in fiscal year 2004, including 656 after oral argument, only four were resolved en banc; of 27,438 appeals resolved on the merits nationally, 51 were resolved en banc after oral argument and eight without oral argument); see generally Richard S. Arnold, "Why Judges Don't Like Petitions for Rehearing," 3 J. App. Prac. & Process 29 (Spring 2001).

cited in the petition in this regard. Indeed, since the filing of the petition, a new spate of reports have described the continuing problem of vehicles whose damage is hidden through circumvention of title-disclosure requirements migrating to urban centers where they are resold to unsuspecting consumers.[2] One recent report specifically focused on the problem that damaged vehicles, such as the thousands damaged in hurricanes Katrina and Rita, are moving to states with "looser titling laws."[3] Similarly, as explained in the petition (at 18-19), damaged vehicles will tend to migrate to the states of the Seventh Circuit, where the ability of injured consumers to enforce the title-disclosure requirements of 49 C.F.R. § 580.5(c) has been seriously undermined.

In sum, Sherman Dodge presents no plausible basis for believing that the circuit conflict will be resolved without this Court's intervention, and no reason for this Court to await developments in other circuits. The conflict should be resolved now.

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[2]See, e.g., Steve Rubenstein, "Warning given on used cars damaged in hurricanes," San Francisco Chronicle, Jan. 27, 2006, available at http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/27/BAG8AGUGML1.DTL; Mike Hanley, "Avoid buying flood-damaged, title washed cars," Duluth Times, Jan. 28, 2006, available at http://www.duluthsuperior.com/mld/duluthsuperior/news/local/13723721.htm.

[3]Jeff Brady, National Public Radio, "Holes in Monitoring System Let Lemons Get Resold," Jan. 31, 2006, available at http://www.npr.org/templates/story/story.php?storyId=5173717.

B. The Supposed Availability Of Equivalent State-Law Remedies Is Not A Basis For Denying Review.

Sherman Dodge claims that the question presented is unimportant because of the availability of state-law "non-mileage" consumer remedies that are equivalent to the remedies that Mr. Ioffe maintains are available under federal law. Br. for Resp. 7-8. Fundamentally, Sherman Dodge is wrong because this Court has never even suggested, let alone held, that the availability of state-law remedies provides a basis for ignoring a federal right of action expressly provided by Congress. Here, in enacting and amending MVICSA in 1972 and 1986, respectively, Congress stated that one of its purposes in adopting a uniform federal law was to avoid actual or potential inconsistencies and gaps in state law. See Petition 13.

In any event, Sherman Dodge's argument is wrong even on its own terms. That is, even assuming that this Court should decline to resolve a conflict over the meaning of federal law when equivalent remedies are available under state law, the state-law remedies here are not, in fact, equivalent. MVICSA's private right of action provides that a person who violates the Act or a regulation promulgated thereunder, with intent to defraud, is liable for treble actual damages or $1,500 per violation, whichever is greater. 49 U.S.C. § 32710(a). Moreover, the court "shall" award costs and "a reasonable attorney's fee" to a prevailing plaintiff. Id. § 32710(b). This unusual automatic fee-shifting statute in favor of prevailing plaintiffs (but not prevailing defendants) underscores the importance Congress accorded to private enforcement under the Act.

As for state law, despite Sherman Dodge's unsupported assertion to the contrary, Sherman Dodge has not shown that the kind of conduct at issue here would give rise to liability under generic state consumer protection statutes. Moreover, the remedies available under such state statutes are far from uniformly equivalent to the specific federal remedies under MVICSA. Many states' consumer protection statutes provide only actual damages, not trebled or otherwise enhanced damages.[4] Many states, including petitioner Ioffe's state, Illinois, see Ill. Comp. Stat. § 505/10a, do not provide presumed statutory damages, let alone the automatic $1,500 minimum under federal law.[5] And, finally, most states provide only a discretionary award of attorney's fees to the prevailing

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[4]Only about half the states' general consumer protection statutes authorize treble or other multiple damage awards at all. National Consumer Law Center, Unfair and Deceptive Acts and Practices 756 (6th ed. 2004); see, e.g., Ark. Code Ann. § 4-88-113(f) (no multiple damages); Conn. Gen. Stat. Ann. § 42-110g(a) (same); Fla. Stat. Ann. § 501.211 (same); Me. Rev. Stat. Ann., tit. 5, § 213(1). Even among states that authorize multiple damages, the conditions under which they may be awarded vary greatly. See National Consumer Law Center, supra, at 758-61; see, e.g., Colo. Rev. § 6-1-113(2)(a)(III) (no treble damages unless shown by clear and convincing evidence that defendant acted in bad faith); La. Rev. Stat. Ann. § 51:1409(A) (no treble damages unless violation is knowing and is committed after notice given by Attorney General).

[5]Only about half the states' consumer protection laws authorize presumed minimum damages at all, National Consumer Law Center, supra note 4, at 754, and among those that do, some are far less generous than MVICSA. See, e.g., Ala. Code § 8-19-10(a)(1) ($100 minimum damages); Mass. Gen. Laws Ann. ch. 93A, § 9(3) ($25 minimum damages).

party, not a mandatory fee, as under MVICSA.[6] In sum, the law of the states often falls well below the uniform national remedial standard set by MVICSA.

In making its state-law equivalency argument, Sherman Dodge also errs in characterizing Mr. Ioffe's position as one that would "federalize" ordinary state common-law fraud. See Resp. Br. 8-9. To prevail on a MVICSA claim, the plaintiff must prove a violation of the Act or one of its regulations. 49 U.S.C. § 32710(a). That is, the plaintiff must prove a violation of federal law. In this case, Mr. Ioffe alleged a violation of 49 C.F.R. § 580.5(c). It is undisputed that the Attorney General may bring an action to enjoin any violation of the Act and its regulations, including section 580.5(c), and to collect substantial civil penalties for such a violation. See 49 U.S.C. § 32709 (a), (c). Because such actions are premised on violations of federal law, they do not "federalize" state law any more than do private damages actions under 49 U.S.C. § 32710(a).[7]

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[6]See, e.g., Ind. Code Ann. § 24-5-0.5-4(a) (court "may" award fees to prevailing party); Md. Code Ann. Com. Law § 13-408(b) (same); Mo. Rev. Stat. § 407.025(1) (same); see also, e.g., Del. Code Ann., tit. 6, § 2533(b) (fee award only in exceptional circumstances and where defendant's underlying violation was willful); N.C. Gen. Stat. Ann. § 75-16.1(1) (fee award only where defendant's conduct was willful and defendant engaged in unwarranted refusal to settle).

[7]Sherman Dodge also mischaracterizes the question presented when it accuses Mr. Ioffe of "forum shopping" by seeking to vindicate his federal claims in federal court. Br. for Resp. 7. Congress gave federal and state courts concurrent jurisdiction to hear MVICSA claims. 49 U.S.C. § 32710(b). Thus, Mr. Ioffe has done nothing wrong by seeking to vindicate his federal claim in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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