No. _____

IN THE
Supreme Court of the United States

SHARON D. ROSE,
Petitioner,

v.

SELECT PORTFOLIO SERVICING, INC.; US BANCORP,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a debtor files for bankruptcy for the first time, Section 362(a) of the Bankruptcy Code imposes an automatic stay that prevents creditors from reaching assets of the debtor, the debtor's non-estate property, and the property of the bankruptcy estate. 11 U.S.C. § 362(a). The bankruptcy estate typically contains the vast majority of a debtor's assets. In 2005, Congress revised the bankruptcy statute to deter repeat bankruptcy filings. A key component of those revisions presumptively terminates the automatic stay "with respect to the debtor" 30 days after a bankruptcy petition is filed if the petitioner had a prior petition pending within the preceding year that was dismissed. 11 U.S.C. § 362(c)(3)(A)

The question presented is:

Whether 11 U.S.C. § 362(c)(3)(A) terminates the automatic bankruptcy stay as to property of the bankruptcy estate.

LIST OF PROCEEDINGS

1. *Rose v. Select Portfolio Servicing Inc.*, No. 19-50598 (5th Cir.) (judgment entered Dec. 10, 2019; mandate issued Jan. 2, 2020).

2. *Rose v. Select Portfolio Servicing Inc.*, No. 18-cv-491-LY (W.D. Tex.) (magistrate recommendation issued Apr. 29, 2019; judgment entered June 11, 2019).

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ShaRon D. Rose petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The decision of the Fifth Circuit (Pet. App. 1a) is reported at 945 F.3d 226 (5th Cir. 2019). The decisions of the district court (Pet. App. 12a) and magistrate judge (Pet. App. 16a) are unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 10, 2019.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

11 U.S.C. § 362(a) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or

[1] The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1332.

to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending

before the date of the order for relief under this title.

11 U.S.C. § 362(c)(3) provides:

> [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
>
> (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and
>
> (C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—
>
> (i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

> (ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor[.]

INTRODUCTION

When a bankruptcy petition is filed, Section 362(a) of the Bankruptcy Code prevents creditors from commencing or continuing actions against a debtor, her property, or the property of her bankruptcy estate to recover a claim that arose before the bankruptcy filing. 11 U.S.C. § 362(a). The purpose of this stay benefits debtors and creditors alike: it gives debtors the opportunity to restructure their financial life so as to emerge from bankruptcy with a fresh start. *See, e.g.*, *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 580 (1st Cir. 2018). It gives creditors the chance to be fairly repaid based upon pre-determined rules, forestalling a rush to the courthouse with each creditor attempting to take what remains from the estate before others empty it. *See*, *e.g.*, *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813, 816 (10th Cir. B.A.P. 2008).

In 2005, Congress amended the Bankruptcy Code to, among other things, deter repeat bankruptcy filings and as part of those amendments modified the operation of the automatic stay as regards repeat bankruptcy filers. Specifically, in 11 U.S.C. § 362(c)(3)(A), Congress provided that for debtors who have more than one

bankruptcy petition pending within the same year, the stay terminates "with respect to the debtor" 30 days after the filing of a second or subsequent bankruptcy petition.

As the Fifth Circuit noted in its decision below, "[c]ourts are divided on the proper interpretation of § 362(c)(3)(A)[.]" Pet. App. 6a. Under the so-called "majority view"—adopted by the Fifth Circuit and approximately fifty district and bankruptcy courts—§ 362(c)(3)(A) dissolves the automatic stay with respect to actions against the debtor and the debtor's non-estate property but not to actions against the bankruptcy estate. Under the so-called "minority view"—adopted by the First Circuit and approximately twenty district and bankruptcy courts—§ 362(c)(3)(A) terminates the automatic stay as to all three of those categories. Pet. App. 6a. This conflict on a fundamental question of bankruptcy law has existed for nearly fifteen years.

Because repeat bankruptcy filers are common, the question presented arises with frequency in the federal courts. And, because the bulk of a debtor's assets are usually contained within the bankruptcy estate, the question of whether § 362(c)(3)(A) terminates the automatic stay with respect only to actions against the debtor and the debtor's non-estate property or also as to actions against the bankruptcy estate has substantial consequences for debtors and creditors alike. Currently the answer to this question turns solely on the geographic location in which the bankruptcy proceeding is filed. Yet there is no reason why the Bankruptcy Code means different things in different parts of the country.

This case presents the ideal vehicle for this Court to resolve this long-standing conflict on a basic question of bankruptcy law. The underlying facts are undisputed and in adopting the "majority" interpretation of § 362(c)(3)(A), the Fifth Circuit recognized its decision squarely conflicted with the position taken by the First Circuit. Moreover, the Court's ruling in this case will be outcome-determinative. Had Petitioner's case arisen in the First Circuit, Respondents' motion for judicial foreclosure would have failed as a matter of law. Because this case arose in the Fifth Circuit, Respondents prevailed.

Finally, review is merited because the Fifth Circuit's interpretation of § 362(c)(3)(A) is wrong. The phrase "with respect to the debtor" does not limit the stay's termination to property of the debtor and the debtor's non-estate property. The text and other indicia of congressional intent make clear that the provision terminates the automatic stay in its entirety.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

So long as a debtor has not had two or more bankruptcy petitions pending within the previous year, the filing of a bankruptcy petition automatically stays collection actions against the debtor, the debtor's property, and property of the bankruptcy estate. 11 U.S.C. § 362(a) (setting forth eight categories of proceedings which are automatically stayed, each covering actions against the debtor, actions against the debtor's property, or actions against property of the

bankruptcy estate); *id.* § 362(c)(4)(A)(i) (exempting certain repeat filers from the automatic stay).

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109–8, 119 Stat. 23. Section 302 of BAPCPA, titled "DISCOURAGING BAD FAITH REPEAT FILINGS" provides, in relevant part:

> [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed . . . *the stay under [11 U.S.C. § 362](a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.*

Id. (emphasis added). This provision is codified at 11 U.S.C. § 362(c)(3)(A).

The remainder of 11 U.S.C. § 362(c)(3) sets forth a detailed scheme for determining whether a "motion of a party in interest for continuation of the automatic stay" beyond the thirtieth day should be granted. In an expedited hearing, *see* 11 U.S.C. § 362(c)(3)(B), the party in interest must demonstrate that the second bankruptcy case was filed in good faith, *id.* § 362(c)(3)(C). The statute creates a rebuttable presumption that the case was not filed in good faith absent "clear and convincing evidence to the contrary." *Id.*

While repeat filers with a single case dismissed within the last year are subject to § 362(c)(3), repeat

filers with more than one case dismissed within the last year are subject to § 362(c)(4). *Compare* 11 U.S.C. § 362(c)(3) (applying to bankruptcy petitions where "a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed,"), *with id.* § 362(c)(4) (applying to bankruptcy petitions "if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed"). Debtors in that latter category are not entitled to any automatic stay at all. *Id.* § 362(c)(4)(A)(i) ("[T]he stay under [§ 362](a) shall not go into effect upon the filing of the later case[.]"). Instead, those debtors (or other parties in interest) have 30 days from the filing of the bankruptcy petition to "request" that the stay "take effect," and must "after notice and a hearing … demonstrate[] that the filing of the later case is in good faith as to the creditors to be stayed[.]" *Id.* § 362(c)(4)(B).

B. Factual Background and Procedural History

Petitioner ShaRon Rose and her then-husband purchased a home in Round Rock, Texas in 2005 with a purchase-money mortgage. Pet. App. 2a, 17a. The mortgage was assigned to Respondent US Bancorp, with Respondent SPS servicing the loan. Pet. App. 2a. No payment was made on the loan after March of 2011. Pet. App. 2a. After Petitioner and her husband divorced, Petitioner was awarded the property. Pet. App. 2a.

On March 26, 2014, Respondents sent Petitioner a Notice of Acceleration regarding the loan and property, and scheduled a foreclosure sale for May 6, 2014. Pet. App. 2a. The day before the foreclosure sale was set to

take place, Petitioner filed suit in Texas state court and requested a temporary restraining order to block the foreclosure sale. Pet. App. 2a. The court granted Petitioner's request, preventing the foreclosure sale from taking place. Pet. App. 2a. The parties ultimately stipulated to a dismissal of that case. Pet. App. 2a.

After Respondents sent Petitioner a second Notice of Acceleration, Petitioner filed her first bankruptcy petition on January 4, 2016. Pet. App. 2a–3a. The court dismissed the petition on January 28, 2017 because Petitioner failed to timely file a "Plan and/or Schedules." Pet. App. 3a. During the next three years, the Respondents scheduled three additional foreclosure sales, but prior to each sale, Petitioner filed for bankruptcy and the sale did not proceed. Pet. App. 3a. It is undisputed that Petitioner's four bankruptcy proceedings were pending in total for at least 269 days. Pet. App. 3a.

On May 3, 2018, prior to the dismissal of her fourth bankruptcy petition, Petitioner filed this case seeking to quiet title to the property and Respondents counterclaimed for judicial foreclosure. Pet. App. 3a. Texas law establishes a four-year statute of limitations for foreclosure of real property, and that limitations period is tolled during a bankruptcy stay. Pet. App. 4a–5a (citing Texas Civil Practice and Remedies Code § 16.035(a) and *HSBC Bank USA, N.A., as Tr. For Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 204–205 (5th Cir. 2018)). Thus, if Petitioner's automatic stays persisted as to the property of her bankruptcy estate throughout the 269 days her petitions were pending, Respondents' counterclaim for judicial foreclosure

would have been filed before the limitations period expired. Pet. App. 4a. In contrast, if § 362(c)(3)(A) functioned to terminate those stays after 30 days for Petitioner's serially-filed petitions, Respondents' counterclaim would have been filed too late. Pet. App. 4a.

The magistrate judge recommended denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment, finding that the statute of limitations for Respondents to foreclose on the property had not expired. Pet. App. 30a–32a. It first held that 11 U.S.C. § 362(c)(3)(A) did not terminate the automatic stay as to Petitioner's bankruptcy estate, which the parties agreed encompassed the property at issue. Pet. App. 28a. Thus, because the automatic stay persisted as to the entire estate including the Property, the statute of limitations was tolled during the entirety of Petitioner's bankruptcy proceedings and had not expired in time to bar the foreclosure sale. Pet. App. 28a. The district court adopted the magistrate judge's recommendation and entered final judgment and an order of foreclosure in Respondents' favor. Pet. App. 15a; Final Judgment and Order of Foreclosure, No. 1:18-cv-00491-LY (June 11, 2019), ECF No. 43.

On appeal, the U.S. Court of Appeals for the Fifth Circuit recognized that the case turned on a single issue: whether 11 U.S.C. § 362(c)(3)(A) terminated the automatic stay with respect to the property of Petitioner's bankruptcy estate (encompassing the Property). Pet. App. 4a. The Fifth Circuit noted that "[c]ourts are divided on the proper interpretation of

§ 362(c)(3)(A)[.]" Pet. App. 6a. It explained that the so-called "majority view" interprets § 362(c)(3)(A) to dissolve the stay with respect to actions against the debtor and the debtor's non-estate property but not actions against the bankruptcy estate, whereas the so-called "minority view" interprets § 362(c)(3)(A) to terminate the stay in its entirety. Pet. App. 6a. The Fifth Circuit adopted the majority view because § 362(c)(3)(A) refers to termination of the automatic stay "with respect to the debtor" and does not mention the bankruptcy estate. Pet. App. 7a–8a (quoting 11 U.S.C. § 362(c)(3)(A)). The court therefore "decline[d] to read in[to]" 11 U.S.C. § 362(c)(3)(A) a reference to the bankruptcy estate. Pet. App. 8a.

The Fifth Circuit also pointed to 11 U.S.C. § 362(c)(4)(A)(i) to bolster its conclusion. Pet. App. 8a. That provision refers to "the stay under subsection (a)" as a whole rather than referring to the stay "with respect to the debtor." 11 U.S.C. § 362(c)(4)(A)(i). The court reasoned that Congress's failure to use similar language in § 362(c)(3)(A) meant that it did not intend the exception to the automatic stay to refer to all three categories mentioned in § 362(a). Pet. App. 8a–9a.

Because it viewed the statutory language as unambiguous, the Fifth Circuit did not consider the statute's purpose or legislative history. Pet. App. 9a–10a. It did, however, acknowledge that its holding was directly contrary to that of the First Circuit and other "minority view" courts. Pet. App. 6a, 10a.

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle for this Court to resolve an acknowledged and entrenched conflict on an

important and frequently recurring legal issue. If Petitioner's case had arisen in the First Circuit, § 362(c)(3)(A) would have terminated her bankruptcy stays as to the property of the estate and the statute of limitations for judicial foreclosure would have expired. But, because Petitioner's case arose in the Fifth Circuit, the automatic stay remained in effect for the entire pendency of her bankruptcy petitions, and thus the respondents' foreclosure efforts were successful.

Courts have been divided on this issue for nearly fifteen years, and further percolation is unnecessary. There is no justification for the current geographic disparity in the automatic stay's protection for property of the bankruptcy estate, and this Court's review is the only way to replace this divergence with a fair and uniform rule.

The petition for certiorari should be granted.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Fifth Circuit acknowledged, its decision was squarely opposed to the rule of the First Circuit, and there is likewise a deeply entrenched conflict among lower courts on this issue—with approximately fifty cases on one side and twenty cases on the other. Pet. App. 6a. This split is widely acknowledged in the lower courts as well. *See, e.g.*, *In re Smith*, 596 B.R. 872, 877 (Bankr. E.D. Tenn. 2019) ("There is a notable split in the case law, with courts unable to agree on the correct application of section 362(c)(3)[.]") (quotation marks omitted) (adopting majority view); *St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 144 (Bankr. D. Mass. 2013)

(describing "[t]he split between the two lines of authority") (adopting minority view).[2]

A. The First Circuit and "minority view" courts interpret § 362(c)(3)(A) to terminate the automatic stay as to the debtor, the debtor's non-estate property, and the property of the bankruptcy estate.

In *In re Smith*, the First Circuit held that § 362(c)(3)(A) terminates the entire scope of the automatic stay. That is, the stay is terminated as to the debtor, the debtor's non-estate property, and the property of the bankruptcy estate. *In re Smith* turned on the exact question presented by the instant petition: whether "§ 362(c)(3)(A) terminate[s] the automatic stay as to actions against property of the bankruptcy estate." 910 F.3d at 578. The First Circuit recognized this was "an important question," and one on which "[c]ourts have divided." *Id.*

The court began its analysis by considering the statutory language and concluded that the text standing alone could not resolve the issue: The meaning of the provision simply "is not plain." *Id.* at 581. In support of this conclusion, the First Circuit observed that while the phrase "with respect to the debtor," might naturally indicate that the provision terminates the automatic stay only as to actions against the *debtor*, "no court has

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[2] While only two courts of appeals have taken a position on this issue, it is especially common in bankruptcy cases for this Court to grant certiorari to resolve 1-1 splits. *See, e.g.*, *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark v. Rameker*, 573 U.S. 122, 126-27 (2014) (1-1 split).

read the provision that way." *Id.* at 582. Instead, majority-view courts read "with respect to the debtor" to apply to actions against the debtor *and* actions against property that is not part of the bankruptcy estate. *Id.* The First Circuit applied various canons of interpretation including the "plain meaning rule," "the maxim 'expressio unius est exclusion alterius,'" the principle that "'Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another,'" and "the rule against superfluities." Under these canons, the First Circuit determined that the statutory phrase "with respect to the debtor" cannot reasonably be read to "limit[] the scope of the automatic stay's termination." *Id.* at 581, 583-85; *see also infra* Part IV (elaborating on the First Circuit's textual analysis). At the same time, the court was hesitant to conclude that the provision unambiguously terminated the entire automatic stay because that simple result would be in tension with the provision's "complex verbiage." 910 F.3d at 581-82.

Finding no plain-text reading of the provision available, the First Circuit determined that the minority-view interpretation better fit with related provisions of the Bankruptcy Code. *Id.* at 585-89. Specifically, reading § 362(c)(3)(A) to terminate the entire automatic stay after 30 days provides the "most sensible middle ground" between the long-term automatic stay for non-serial filers under § 362(c)(1) and (c)(2) and the absence of any automatic stay for the most egregious repeat filers under § 362(c)(4). *Id.* at 586-88 (describing this "system of progressive protections," in which "protections for second-time filers should fall" between those two poles). In addition, the court found

the detailed scheme for adjudicating extension requests under § 362(c)(3)(B) could not be reconciled with the majority view, under which those requests would apply only in extremely rare circumstances and would yield virtually meaningless consequences. *Id.* at 588.

Finally, the First Circuit addressed the provision's purpose. It examined BAPCPA's legislative history, which makes clear that Congress aimed to create a substantial deterrent for serial bankruptcy filings. *Id.* at 589-91. The court concluded that interpreting § 362(c)(3)(A) to terminate the entire automatic stay, rather than preserving the stay for the category in which most of a debtor's assets were likely to be contained, was the only result compatible with congressional intent. *Id.* at 578, 589-91

In so ruling, the First Circuit joined numerous lower courts throughout the country. *See* Pet. App. 33a-38a (collecting minority-view cases). The First Circuit's decision also aligns with dicta on this question from the Second Circuit and the Fourth Circuit. *See Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 163 (2d Cir. 2010) (observing that "the automatic stay protecting the debtor's assets, which comes into being when a petition is filed, terminates after thirty days"); *Tidewater Fin. Co. v. Williams*, 498 F.3d 249, 259 (4th Cir. 2007) (noting that under § 362(c)(3) "the automatic stay generally dissolves after 30 days").

B. The Fifth Circuit and "majority view" courts interpret § 362(c)(3)(A) to terminate the automatic stay as to the debtor and the debtor's non-estate property, but not as to the property of the bankruptcy estate.

In the decision below, the Fifth Circuit held that 11 U.S.C. § 362(c)(3)(A) terminates the automatic stay with respect to only the debtor and the debtor's non-estate property. Pet. App. 20a-22a, 117a-119a. That decision squarely conflicts with the rule in the First Circuit and "minority view" courts, and is consistent with the rule in approximately fifty "majority view" courts. *See* Pet. App. 33a-38a (collecting majority-view cases).

As noted above, the Fifth Circuit found the statutory text was clear. Specifically, it read the term "with respect to the debtor" to unambiguously exclude property of the bankruptcy estate. It thus did not undertake any analysis of the legislative history or the policy objectives that the statute was intended to accomplish. Instead, it fortified its reading of the statutory language with the observation that "'Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute.'" Pet. App. 8a (quoting *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013). Because 11 U.S.C. § 362(c)(4)(A)(i) refers to "the stay under subsection (a)" in general terms, the court reasoned, Congress must not have intended to do so in § 362(c)(3)(A).

Other majority-view courts have aimed to reconcile this result with the goals of the bankruptcy system. In *Rinard v. Positive Investments, Inc. (In re Rinard)*, for example, the court reasoned that termination of the

automatic stay with respect to bankruptcy-estate property would result in a "creditor race to the courthouse." 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011). That would "overturn[] the primary overarching two premises of federal bankruptcy law—a fresh start for an honest debtor and equal treatment among classes of creditors." *Id.* Similar concerns motivated the Bankruptcy Appellate Panel of the Tenth Circuit in *In re Holcomb*: "At the core of bankruptcy law is the policy of 'obtaining a maximum and equitable distribution for creditors'. The minority approach circumvents this policy by allowing a single creditor, who may be oversecured, full access to property that would otherwise be property of the estate." 380 B.R. at 815 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994)).

* * *

Had Petitioner's case arisen in the First Circuit, her automatic stays would have terminated as to the Property after her second, third, and fourth bankruptcy petitions were pending for only 30 days. The statute of limitations on the Respondents' motion for judicial foreclosure would have been tolled only for those 30-day periods—rather than the entire pendency of those bankruptcy cases—and thus would have expired. Because Petitioner's case arose in the Fifth Circuit, however, none of her bankruptcy stays terminated after 30 days as to the Property, leaving the respondents free to foreclose. The clear and entrenched conflict of authority on this issue inevitably will continue absent intervention from this Court. Particularly given that the First Circuit ruled with full knowledge of the "majority

position" and the Fifth Circuit ruled knowing it was creating a clear circuit split, further percolation is unnecessary.

II. THIS CASE PRESENTS A RECURRING, SIGNIFICANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

The scores of lower-court cases interpreting § 362(c)(3)(A) confirm that the question presented is a recurring one. Indeed, lower courts from nearly every circuit have taken a position on the question presented over the past fifteen years. *See* Pet. App. 33a-38a. Nationwide bankruptcy statistics further demonstrate that this issue confronts lower courts on a regular basis: hundreds of thousands of bankruptcy cases are filed every year "under chapter 7, 11, or 13," virtually all of which count toward § 362(c)(3)'s serial-filing limit. 11 U.S.C. § 362(c)(3); *see* Admin. Office of the U.S. Courts, *U.S. Bankruptcy Courts* tbl. 7.3 (listing the number of annual bankruptcy filings by chapter). As a share of this number, second-time filings within the scope of § 362(c)(3)(A) are "commonplace." Howard Gershman, *Serial Filings, Stay Termination, and Following Alice Through Bankruptcy Code § 362(c)(3), in Norton Annual Survey of Bankruptcy Law* 337 (William L. Norton, III ed., 2019); *see also id.* at 341 ("Often the second filing is by a debtor's attorney engaged after the first pro se case has been dismissed or by a debtor who wants another chance to try to stop a foreclosure."). This data suggests that the question presented to this Court confronts bankruptcy courts every single day.

The question presented is also important. As this Court has recognized, the automatic stay under § 362 is

a "fundamental … protection[] provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986); *see also St. Anne's Credit Union*, 490 B.R. at 143 (referring to the automatic stay as a "central provision of the bankruptcy code"). It is likewise well-settled that the vast majority of property to which the automatic stay applies is housed within the bankruptcy estate. *See* 11 U.S.C. § 541(a); *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992) ("When a debtor files a bankruptcy petition, all of his property becomes property of a bankruptcy estate."); *In re Smith*, 910 F.3d at 586 ("The vast majority of the debtor's property becomes estate property on the filing of a bankruptcy petition."). For debtors within the scope of § 362(c)(3), then, the answer to the question presented makes the difference between retaining this "fundamental" safeguard entirely or barely at all. *Midlantic*, 474 U.S. at 503; *see also In re Smith*, 910 F.3d at 580 (explaining that the automatic stay "offers debtors breathing room during the period of financial reshuffling" (internal quotation marks omitted)). In more practical terms, the answer to the question presented makes the difference between blocking or allowing "foreclosures of real estate, repossession of motor vehicles or other personal property, and garnishments of postpetition earnings[.]" W. Homer Drake et al., 13 Practice & Procedure § 15:26, Westlaw (database updated June 2019).

The answer to this question is vitally important to creditors as well. Indeed, several courts have emphasized that the automatic stay as applied to bankruptcy-estate property is "an important creditor protection." *In re Holcomb*, 380 B.R. at 816 (explaining

that the duration of the stay affects whether "the policy of 'obtaining a maximum and equitable distribution to creditors'" can be realized (quoting *BFP v. Res. Trust Corp.*, 511 U.S. 531, 563 (1994))); *see also In re Rinard*, 451 B.R. at 19 (same).

Nationally uniform resolution of this question is likewise crucial. Under current law, the regional disparities arising from the same exact statutory text result in tremendous unfairness. There is no principled reason why a bankrupt homeowner in Maine should not be equally protected from foreclosure under federal law as she would be in Texas. There is no principled reason why a bankrupt wage-earner in Massachusetts should not be equally shielded from garnishment of earnings under federal law as he would be in Mississippi. There is no principled reason why a bankrupt car-owner in Vermont should not be equally subject to repossession under federal law as she would be in Louisiana. But the circuit split on this question ensures that these forms of unfairness will persist absent this Court's intervention.

Likewise, the currently unsettled state of the law creates wasteful and unnecessary litigation throughout the country. Courts nationwide continue to painstakingly analyze the same statutory text and other indicia of congressional intent, only to take one side or the other on this entrenched split and leave litigants in future cases no better equipped to predict what the next court will hold.[3] In addition to causing unnecessary

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[3] This process is made all the more difficult given courts' shared view that the BAPCPA is "at best, particularly difficult to parse and, at worst, virtually incoherent." *In re Charles*, 332 B.R. 538, 541

litigation to *answer* the question presented, this unsettled law breeds unnecessary litigation to *avoid* the question. "With such uncertainty about the meaning of section 362(c)(3), the best approach"—according to one practice guide—"is to avoid the issue altogether and file a motion to extend the automatic stay" under § 362(c)(3)(B). Gershman, 2019 Ann. Surv. Bankr. Law 352. Uncertainty also incentivizes litigation under § 362(j), by which "[c]reditors, justifiably reluctant to proceed" with collection efforts as to property over which the stay may or may not have been terminated under § 362(c)(3)(A), "can 'request' a 'comfort order' confirming the absence of a stay[.]" Gershman, 2019 Ann. Surv. Bankr. Law 355; *see also* 11 U.S.C. § 362(j) ("On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated."). This Court's resolution of the question presented would eliminate all of those unnecessary filings and allow the bankruptcy courts to more efficiently process their enormous caseloads. *See* Federal Judicial Center, *Federal Bankruptcy Caseloads, 1899-2016*, https://www.fjc.gov/

(Bankr. S.D. Tex. 2005); *see also In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006) ("Once again, warily, and with pruning shears in hand, the court re-enters the briar patch that is § 362(c)(3)(A)"); *In re Baldassaro*, 338 B.R. 178, 182 (Bankr. D.N.H. 2006) (collecting cases observing that "§ 362(c)(3) is very poorly written" and "likewise find[ing that] the provisions [are] neither consistent nor coherent"); Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 Am. Bankr. L.J. 195, 197 (2007) ("It is mere under-statement to acknowledge that BAPCPA has been repeatedly recognized by the bankruptcy community as, what in common parlance would be called, a mess.").

history/exhibits/graphs-and-maps/federal-bankruptcy-caseloads-1899-2016 (last visited Feb. 10, 2020) (reporting that bankruptcy cases "continue to outnumber all other federal judicial matters").

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case presents an ideal vehicle for this Court to resolve the circuit split. The material facts are undisputed, and the Fifth Circuit squarely ruled on the question presented. That ruling was determinative of Petitioner's case, and the Fifth Circuit explicitly considered and rejected the contrary rule of the First Circuit that Petitioner had proposed.

Before the magistrate judge, Petitioner argued that she was entitled to summary judgment because 11 U.S.C. § 362(c)(3)(A) terminated the stay as to the property of her bankruptcy estate. *See* Plaintiff's Motion for Summary Judgment at 10, ECF No. 26. Petitioner directly addressed the First Circuit's decision in *In re Smith*, characterizing it as applying the "common sense reading" of the statute. *Id.* (quotation marks omitted); *see also id.* at 12-13 (arguing that the First Circuit was correct in interpreting the statute in accordance with the text "as it appears on the page" and "the policies animating the 2005 bankruptcy reforms"). Respondents (then-Defendants) countered that the "Thirty Day Termination of [the] Bankruptcy Stay Does Not Apply to Property of the Bankruptcy Estate." Defendants' Response to Plaintiff's Motion for Summary Judgment at 9, ECF No. 28. Citing several majority-view bankruptcy cases, Respondents asserted that the "plain language" of the statute supported their position

"that the termination of the bankruptcy stay [did] not apply to the bankruptcy estate." *Id.* at 10; *see also* Defendants' Motion for Summary Judgment at 13–14, ECF No. 33 (making the same argument and citing numerous majority-view cases).

Before the district court, Petitioner's "chief legal objection" to the magistrate judge's ruling was on the question presented. Plaintiff's Objections at 2–3, ECF No. 39 (objecting to the ruling "that repeat bankruptcy filings within one year do not wholly curtail the automatic stay"); *see also id.* at 5–6 (asserting that the magistrate judge's ruling "thwarts the will of Congress and the hard-fought victory of creditors in obtaining a curtailment of the bankruptcy stay for serial filers"). Petitioner argued that "[t]his court should adopt the reasoning of the First Circuit in *In re Smith*, which on the undisputed facts of this case is dispositive in Rose's favor." *Id.* at 7. Respondents recognized that the courts "are still split" on the interpretation of § 362(c)(3)(A) and expressed "agree[ment] with the Magistrate Judge's recommendation" to rely on the majority-view line of authority. Defendants' Responses to Plaintiff's Objections at 3, ECF No. 40.

On appeal, Petitioner renewed her argument that § 362(c)(3)(A) terminates the entire stay. She asked the Fifth Circuit to adopt the First Circuit's rule, calling *In re Smith* "the most exhaustive and persuasive case to date" and highlighting the First Circuit's "plain reading of the statute" and recognition of "the will of Congress." Appellant's Brief, No. 19-50598 at 30–34. Respondents countered that "[Petitioner's] reliance on *In Re Smith* does not warrant reversal." Appellee's Brief at 11; *see*

also id. at 13 (arguing that Respondents prevail "by application of the majority approach"). And prior to the Fifth Circuit's ruling, Petitioner moved for a stay, arguing that "[t]he underlying case breaks dispassionately on a single, contested issue of federal bankruptcy law" on which the "leading case [*In re Smith*] breaks Rose's way." Motion to Stay at 2–3.

The question presented in this petition has been presented, and ruled upon, at every stage of Petitioner's case. In contrast, because many individuals facing foreclosure do not hire counsel, the records in cases raising this question are rarely as clean. Petitioner's case presents the ideal vehicle for review of this question.

IV. THE FIFTH CIRCUIT'S DECISION WAS INCORRECT.

Finally, the Fifth Circuit's decision merits review because it is wrong. As the First Circuit correctly recognized, minority-view courts' reading of § 362(c)(3)(A) to terminate the entire stay is "the only one compatible with the text, seen in light of its context and purpose." *In re Smith*, 910 F.3d at 578.

As a purely textual matter, the Fifth Circuit's decision is wrong for three reasons.

First, the Fifth Circuit's conclusion is at odds with its reasoning. As noted, the Fifth Circuit reasoned that the "plain language" of the statutory phrase "with respect to the debtor" compels its interpretation. Pet. App. 8a, 10a. It observed that § 362(a) "'operates as a stay of certain actions in three categories: against the debtor, the debtor's property, and property of the bankruptcy

estate.'" Pet. App. 7a (quoting *In re Smith*, 910 F.3d at 580). Based on the provision's failure to expressly reference that third category—the bankruptcy estate—and instead speak to termination of the automatic stay "with respect to the debtor," the Fifth Circuit concluded that § 362(c)(3)(A) speaks to only actions against the debtor and the debtor's property.

This holding conflicts with the most natural reading of the statutory language. "[W]ith respect to the *debtor*," standing alone, would indicate that the provision terminates the automatic stay only as to actions against the *debtor*. But "no court"—including the Fifth Circuit—"has read the provision that way." *In re Smith*, 910 F.3d at 582 (citing *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 367-88 (B.A.P. 9th Cir. 2011)). Instead, the Fifth Circuit and other majority-view courts inexplicably read that language to terminate actions against two of the three categories covered by the automatic stay: actions against the debtor *and* actions against the debtor's non-estate property. Pet. App. 7a (adopting "the majority position")[4]; *see also In re Smith*, 910 F.3d at 582 (noting this anomaly); *In re Daniel*, 404 B.R. 318, 323 (Bankr. N.D. Ill. 2009) (same). As the First Circuit explained, no other portion of § 362(c)(3)(A) supplies the reference to the debtor's

[4] The Fifth Circuit's analysis on this point further exemplifies courts' confusion on this issue. In consecutive paragraphs, the Fifth Circuit expressly recognized these "three categories" but nonetheless conveyed its conclusion in a way that collapses the distinction between the two non-estate categories. Pet. App. 7a (stating that "§ 362(c)(3)(A) terminates the stay only with respect to the debtor" and "does not terminate the stay with respect to the property of the bankruptcy estate").

property that is missing from majority-view courts' analysis. *In re Smith*, 910 F.3d at 582-83.

Second, the Fifth Circuit was incorrect that § 362(c)(3)(A) refers back to the three § 362(a) categories at all. As the First Circuit pointed out, "[n]one of the 'with respect to' phrases in § 362(c)(3)(A) mirror language in § 362(a)." *In re Smith*, 910 F.3d at 583. Section 362(a) does not contain the phrase "*with respect to* the debtor"; it refers to actions "*against* the debtor," "*against* property of the debtor," and "*against* property of the estate." In any event, when Congress has wanted to distinguish between the debtor and the debtor's estate, it has done so explicitly. *See, e.g.*, 11 U.S.C. § 346(b) (providing that certain categories "shall be taxed to or claimed by the *debtor* … and may not be taxed to or claimed by the *estate*" (emphasis added)); *id.* § 362(c)(1) & (2) (distinguishing between "the stay of an act against property of the estate under subsection (a)" and "the stay of any other act under subsection (a)"); *see also* Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(C)(3)(A)*, 86 Am. Bankr. L.J. 407, 435 (2013) (making the same argument).

Third, the Fifth Circuit's ruling creates discord with the remainder of the statute. Section 362(c)(3)(A) is just the beginning of a lengthy provision that sets forth precisely how the debtor or any other "party in interest" can overcome the presumptive termination of the stay. "Subsection (c)(3) contains 472 words, 364 of which address the process and effects of filing motions for continuation of the automatic stay beyond the thirty-day termination date." *Smith v. Me. Bureau of Revenue*

Servs., 590 B.R. 1, 17 (D. Me. 2018), *aff'd sub nom. In re Smith*, 910 F.3d 576 (1st Cir. 2018). The Fifth Circuit's ruling creates the "illogical" result that this provision—"which both requires moving parties to meet a high burden of proof and which requires the courts to hear these matters on an expedited basis"—lays out a labyrinthine path to a "meaningless" result. *In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006). Virtually all assets, which are housed in the estate, would remain protected by the automatic stay regardless. *Id.*; *see also Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 368 (B.A.P. 9th Cir. 2011) (reasoning that the majority approach is "difficult to reconcile" with the rest of § 362(c)(3)); *In re Jones*, 339 B.R. 360, 364 (Bankr. E.D.N.C. 2006) (acknowledging that the majority view is in tension with § 362(c)(3)(B)). The Fifth Circuit's rule therefore renders the rest of § 362(c)(3) nearly superfluous.

Nor can the Fifth Circuit's reading be reconciled with § 362(j). That subsection requires courts to "issue an order under subsection (c) confirming that the automatic stay has been terminated" upon the request of any "party in interest." 11 U.S.C. § 362(j). As minority-view courts have recognized, "[t]his provision would be inconsistent with § 362(c)(3)(A), if it does not effect a wholesale termination of the stay, because § 362(j) does not carve out exceptions for property that remains protected by the stay and summarily allows parties to confirm that the stay has been terminated under § 362(c)." *In re Reswick*, 446 B.R. at 369 n.7 (quoting *Jupiter*, 344 B.R. at 760). Section 362(c)(1), (2), and (4) all address the automatic stay in gross; it is only

the Fifth Circuit's erroneous interpretation of subsection (c)(3) that creates this inconsistency.

In addition to these textual reasons, the Fifth Circuit's decision is wrong because it conflicts with congressional intent. Indeed, the legislative history underlying § 362(c)(3)(A) makes clear that Congress intended to create a strong disincentive for serial bankruptcy filings—not, as the Fifth Circuit held, an arbitrary and nearly-nonexistent one.[5]

"Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010). "[S]erial … bankruptcy filings" in particular were the perceived abuses at "[t]he heart of [BAPCPA's] consumer bankruptcy reforms." H.R. Rep. No. 109–31(I), at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89; *see also* Sara Sternberg Green, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 242 (2015). The House Report accompanying the reform codified at § 362(c)(3)(A) described the provision as "amending section 362(c) of the Bankruptcy Code to *terminate the automatic stay* within 30 days in a chapter 7, 11, or 13 … case pending within the preceding one-year period"—not as amending the provision to terminate a small portion of the automatic stay. H.R.

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[5] As the First Circuit noted, "[t]he Supreme Court often consults legislative history in bankruptcy decisions to ensure that its interpretations are consistent with Congress's purposes." *In re Smith*, 910 F.3d at 589 (citing *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1763-64 (2018); *Ransom v. FIA Card Sers., N.A.*, 562 U.S. 61, 71 (2011), and *Milavetz , Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2018)).

Rep. No. 109–31(I), at 69, 2005 U.S.C.C.A.N. at 138 (emphasis added). The House Report likewise characterized the provision as "Discouraging Bankruptcy Abuse" and "Discouraging Bad Faith Repeat Filings." *Id.* These descriptions align with the rule in the First Circuit. They are irreconcilable with the rule in the Fifth Circuit.

Legislative history from BAPCPA's precursor legislation reinforces this conclusion. In 1998, Congress considered "an amendment that was 'essentially identical' to § 362(c)(3)(A)." *In re Smith*, 910 F.3d at 590 (quoting *In re Reswick*, 446 B.R. at 372). Congress described that amendment as fixing the "problem" of "debtors fil[ing] successive bankruptcy cases to prevent secured creditors from foreclosing on their collateral … by terminating the automatic stay in cases filed by an individual debtor … if his or her prior case was dismissed within the preceding year." H.R. Rep. No. 105–540 at 80 (1998). The only relevant difference between this draft legislation and the 2005 legislation codified at § 362(c)(3)(A) is that the 1998 draft legislation applied to second-time *and* third-time repeat filers. *See* S. Rep. No. 105–253 (1998). As the First Circuit pointed out, "[t]he authors of the 1998 bill, aiming to deter and discipline even the most egregious abuses, would probably not have designed a provision with the limited effects of [the Fifth Circuit's] reading. More likely … the 1998 Congress intended to terminate the automatic stay" in its entirety. *In re Smith*, 910 F.3d at 590. Had this intent changed in the 2005 legislation, "that shift [would have been] reflected in the BAPCPA House Report, or elsewhere in BAPCPA's legislative history." *Id.* at 590-91. But rather than signaling a shift, Congress

doubled down on its goal of "terminating the automatic stay"—as a whole—after 30 days. H.R. Rep. No. 109–31, at 71, 2005 U.S.C.C.A.N. at 139.

Not only does the Fifth Circuit's rule create an ineffective policy of discouraging repeat filings, but it also creates an arbitrary one. Terminating the automatic stay with respect to property of the debtor would result in four discrete consequences:

> (1) certain governmental creditors can collect tax refunds for non-tax debts, (2) certain governmental creditors can pursue exempt property to satisfy non-dischargeable tax debts, (3) certain governmental creditors can suspend a debtor's driver's license, and (4) creditors can make collection calls.

In re Smith, 910 F.3d at 587. The First Circuit correctly rejected the notion "that Congress would have 'draw[n] such seemingly arbitrary distinctions' between second-time and other repeat filers." *Id.* (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018)). There is absolutely no reason why Congress would have isolated these particular categories. For it to have done so by inserting "with respect to the debtor" in § 362(c)(3)(A) strains any principle of statutory interpretation beyond its breaking point.[6] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2011)

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[6] According to one study, all ten uses of the phrase "with respect to the debtor" in BAPCPA could be removed without making any substantive change to the statute. *See* Meltzer, 86 Am. Bankr. L.J. at 432 ("[I]n tallying the score between superfluous and nonsuperfluous appearances of the phrase, the score is 10-0, not 9-1 or 8-2.").

("Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."); *Smith*, 590 B.R. at 18 (same, in the context of § 362(c)(3)(A)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals, Fifth Circuit.

ShaRon D. ROSE, Plaintiff–Appellant,
v.
SELECT PORTFOLIO SERVICING, INCORPORATED; US BANCORP, Defendants–Appellees.

No. 19-50598
|
Summary Calendar
|
FILED December 10, 2019

Before OWEN, Chief Judge, and SOUTHWICK and WILLETT, Circuit Judges.

Opinion

PER CURIAM:

The case is about a foreclosure. Plaintiff ShaRon Rose (Rose) sued Select Portfolio Servicing, Inc. (SPS) and US Bank, N.A. (US Bank) (collectively Defendants), asserting a claim to quiet title and separately seeking a declaratory judgment that the statute of limitations had expired on Defendants' power to foreclose on certain real property. The Defendants counterclaimed for judicial foreclosure, relying on various tolling concepts. The district court denied Rose's motion for summary judgment, granted the Defendants' motion for summary judgment, and entered a Final Judgment and Order of Foreclosure. Rose now appeals,

challenging the district court's determination that the statute of limitations had not run on the Defendants' counterclaim for judicial foreclosure. We affirm.

I

In 2005, Rose and her then-husband purchased property with a purchase-money mortgage. The mortgage was eventually assigned to US Bank, with SPS servicing the loan. In 2010, Rose and her husband divorced. Rose's husband was awarded the home, subject to a lien that required him to convey the home to Rose in the event of default. The record indicates that no payment has been made on the loan since March 1, 2011. Although the property was not conveyed to Rose until 2016, she has been actively involved in litigation concerning foreclosure of the property since early 2014.

On October 1, 2013, Defendants sent Rose a Notice of Default regarding the loan and her property. Then, on March 26, 2014, Defendants sent Rose a Notice of Acceleration regarding the loan and property, setting a May 6, 2014 foreclosure sale. On May 5, 2014, Rose sued in Texas state court, asserting various claims relating to the pending foreclosure sale and requesting a TRO. The state court granted the TRO that same day, blocking the May 6th foreclosure sale. After the TRO expired, the Defendants removed the case to federal court. The case was then dismissed with prejudice by stipulation of the parties.

On June 2, 2015, the Defendants sent Rose a second Notice of Acceleration, setting a July 7, 2015

foreclosure sale. On January 4, 2016, Rose filed her first bankruptcy petition. The matter was dismissed on January 28, 2016 because Rose failed to file timely a "Plan and/or Schedules." Over the course of the next three years, the Defendants sent three additional Notices of Acceleration, each setting a new date for the foreclosure sale. Each time, Rose filed for bankruptcy protection just days before the scheduled sale, thwarting Defendants' attempts to foreclosure. According to the parties, the four bankruptcy proceedings were pending for at least 269 days.

Before her last bankruptcy matter was dismissed, Rose sued to quiet title in state court, claiming that the statute of limitations had expired on Defendants' power to foreclose. Defendants removed under diversity jurisdiction. Then, on September 21, 2018, Defendants counterclaimed for judicial foreclosure. Both parties moved for summary judgment. The district court denied Rose's motion and granted the Defendants' motion, adopting the magistrate judge's report and recommendation that the statute of limitations had not expired on Defendants' power to foreclose. The district court then entered a Final Judgment and Order of Foreclosure in favor of the defendants. Rose appeals the Report and Recommendation, the Order on the Report and Recommendation of the United States Magistrate Judge, and the Final Judgment and Order of Foreclosure.

II

This court reviews a grant of summary judgment de

novo.[1] A grant of summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2] "The evidence and all inferences must be viewed in the light most favorable to the non-movant."[3]

III

Rose's appeal hinges on whether the statute of limitations expired on the Defendants' power to foreclose on her property. Whether the statute of limitations expired turns on the length of Rose's bankruptcy stays. According to Rose, her status as a repeat filer under the bankruptcy code curtails the stays in this case to 135 days. Under that calculation, the Defendants' claim would be barred. She argues that the district court erred in concluding otherwise.

Under Texas Civil Practice and Remedies Code § 16.035(a), "[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues."[4] Similarly, "[a] sale of real property under a power of sale in a mortgage or deed of trust that creates a real

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[1] *Shepherd ex rel. Estate of Shepherd v. City of Shreveport*, 920 F.3d 278, 282 (5th Cir. 2019) (quoting *DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 490 (5th Cir. 2018)).

[2] FED. R. CIV. P. 56(a).

[3] *Germain v. US Bank Nat'l Ass'n as Tr. for Morgan Stanley Mortgage Loan Tr. 2006-7*, 920 F.3d 269, 272 (5th Cir. 2019) (citing *FDIC v. Dawson*, 4 F.3d 1303, 1306 (5th Cir. 1993)).

[4] TEX. CIV. PRAC. & REM. CODE § 16.035(a).

property lien must be made not later than four years after the day the cause of action accrues."[5] After four years from accrual, "the real property lien and a power of sale to enforce the real property lien become void."[6]

Texas common law tolls the statute of limitations during a bankruptcy stay.[7] The federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), however, limits the automatic stay for debtors who have filed for bankruptcy within the past year. Specifically, 11 U.S.C. § 362(c)(3)(A) provides:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under Chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under section 707(b)—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case ....

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[5] TEX. CIV. PRAC. & REM. CODE § 16.035(b).
[6] TEX. CIV. PRAC. & REM. CODE § 16.035(d).
[7] *See HSBC Bank USA, N.A., as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 204-205 (5th Cir. 2018) (discussing the Texas common law tolling principle); *see also Peterson v. Tex. Commerce Bank-Austin, Nat'l Ass'n*, 844 S.W.2d 291, 293-94 (Tex. App. 1992) (same).

Courts are divided on the proper interpretation of § 362(c)(3)(A) and the import of the phrase "with respect to the debtor."[8] The Fifth Circuit has not addressed the issue. The majority view, adopted by three bankruptcy courts in this circuit,[9] interprets the provision to terminate the stay as to actions against the debtor but not as to actions against the bankruptcy estate.[10] According to the majority, the plain meaning of the provision dictates such an interpretation.[11] The minority view, adopted by the First Circuit as a matter of first impression in the courts of appeals, "reads the provision to terminate the whole stay."[12] According to the minority, the provision is ambiguous; therefore, congressional intent is determinative.[13] After reviewing the legislative history surrounding the provision and the BAPCPA, the minority conclude that Congress intended the provision to terminate the stay in its

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[8] *See In re Smith*, 910 F.3d 576, 581 (1st Cir. 2018) (noting the split); *see also Smith v. Me. Bureau of Revenue Servs.*, 590 B.R. 1, 7 n.1, 9 n.3 (D. Me. 2018).

[9] *In re Gautreaux*, No. 14-10226, 2014 WL 4657433, at *1 (Bankr. E.D. La. Sept. 16, 2014); *In re Williford*, No. 13-31738, 2013 WL 3772840, at *2-3 (Bankr. N.D. Tex. July 17, 2013); *In re Scott–Hood*, 473 B.R. 133, 136-40 (Bankr. W.D. Tex. 2012).

[10] *See, e.g.*, *In re Rinard*, 451 B.R. 12, 18-20 (Bankr. C.D. Cal. 2011).

[11] *See, e.g.*, *In re Holcomb*, 380 B.R. 813, 816 (10th Cir. BAP 2008) (noting that there is "no ambiguity in the language of the statute"); *In re Williford*, 2013 WL 3772840, at *3 (noting that "the relevant statutory language is clear"); *In re Rinard*, 451 B.R. at 19 (noting that the "plain text of § 362(c)(3)(A) is crystal clear").

[12] *In re Smith*, 910 F.3d at 581; *see also In re Paschal*, 337 B.R. 274, 278-81 (Bankr. E.D.N.C. 2006).

[13] *See, e.g.*, *In re Reswick*, 446 B.R. 362, 371 (9th Cir. BAP 2011) (resorting to legislative history after determining the language in § 362(c)(3)(A) is ambiguous).

entirety.[14]

We adopt the majority position, which has already been applied in the district where Rose has repeatedly filed for bankruptcy.[15] Specifically, after reviewing the plain language of the provision and the context of the provision within § 362, we conclude that § 362(c)(3)(A) terminates the stay only with respect to the debtor; it does not terminate the stay with respect to the property of the bankruptcy estate.

We believe the language in § 362(c)(3)(A) is clear. As an initial matter, we note that § 362(c)(3)(A) cannot be read in isolation; it must be read in conjunction with § 362(a), which defines the scope of the automatic stay.[16] As the First Circuit aptly noted in *In re Smith*, § 362(a) "operates as a stay of certain actions in three categories: against the debtor, the debtor's property, and property of the bankruptcy estate."[17] For example, § 362(a)(1) stays actions "against the debtor"; § 362(a)(2) stays "enforcement of a judgment against the debtor or against property of the estate"; and § 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate."[18]

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[14] *See, e.g.*, *Smith v. Me. Bureau of Revenue Servs.*, 590 B.R. 1, 9-10 (D. Me. 2018) (discussing how minority view courts examine the legislative history of the BAPCPA).

[15] *See In re Scott–Hood*, 473 B.R. 133, 136-40 (Bankr. W.D. Tex. 2012).

[16] *See* 11 U.S.C. § 362(a).

[17] *In re Smith*, 910 F.3d 576, 580 (1st Cir. 2018) (internal quotation marks omitted).

[18] *See In re Alvarez*, 432 B.R. 839, 842 (Bankr. S.D. Cal. 2010) (quoting *In re Jones*, 339 B.R. 360, 363-64 (Bankr. E.D.N.C. 2006));

After recognizing that § 362(a) operates as a stay as to certain actions in three separate categories, the language in § 362(c)(3)(A) becomes clear. In § 362(c)(3)(A), Congress stated that "the stay under [§ 362(a)] ... shall terminate *with respect to the debtor*."[19] There is no mention of the bankruptcy estate, and we decline to read in such language.

Moreover, "Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute."[20] Section 362(c)(4)(A)(i)—which discusses debtors who have had two or more cases pending in the prior year—does not include the limiting language in § 362(c)(3)(A).[21] It merely states that "the stay under subsection (a) shall not go into effect upon the filing of the later case."[22] Accordingly, for debtors falling under § 362(c)(4)(A)(i), the automatic stay is terminated in its entirety.[23] In contrast, Congress chose to use a qualifier

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11 U.S.C. § 362(a).

[19] *See* 11 U.S.C. § 362(c)(3)(A) (emphasis added).

[20] *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013).

[21] *See* 11 U.S.C. § 362(c)(4)(A)(i). In its entirety, § 362(c)(4)(A)(i) provides the following

> [I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case ....

Id.

[22] *Id.*

[23] *See, e.g.*, *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013) (discussing § 362(c)(4)(A)(i)'s

in § 362(c)(3)(A). This can only be interpreted as "impl[ying] a limitation upon the scope of the termination of the automatic stay."[24]

Importantly, we are not convinced that this plain meaning interpretation substantially harms creditors.[25] As one court in this circuit aptly noted,[26] creditors may file a motion for relief under § 362(d) if a debtor is abusing the automatic stay.[27] The motion must be heard within 30 days, and it will be granted unless the debtor can offer the creditor adequate protection.[28] Therefore, even if the automatic stay remains in effect with respect to the bankruptcy estate—as is the case under our interpretation of § 362(c)(3)(A)—creditors can still obtain judicial relief under § 362(d) if circumstances demand it.

We recognize that several courts have found § 362(c)(3)(A) somewhat ambiguous.[29] But when read in

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language in relation to § 362(c)(3)(A)'s).

[24] *Id.*

[25] *See, e.g.*, *In re Scott–Hood*, 473 B.R. 133, 136 n.3 (Bankr. W.D. Tex. 2012); *but see In re Jupiter*, 344 B.R. 754, 761-62 (Bankr. D.S.C. 2006) (suggesting that the majority's plain meaning interpretation would harm creditors).

[26] *In re Scott–Hood*, 473 B.R. at 136 n.3.

[27] *See* 11 U.S.C. § 362(d).

[28] *Id.*

[29] *See In re Williford*, No. 13-31738, 2013 WL 3772840, at *2 (Bankr. N.D. Tex. July 17, 2013) (collecting cases); *see also In re Baldassaro*, 338 B.R. 178, 182 & n.3 (Bankr. D.N.H. 2006) (describing § 362(c)(3) as "poorly written" and "bad work product"); *In re Charles*, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005) (explaining how § 362(c)(3) is "at best, ... difficult to parse").

conjunction with § 362(a) and the other language in § 362(c), we believe the meaning of the provision is clear. Moreover, we are not unsympathetic to other courts' conclusions that a contrary interpretation may better serve the BAPCPA's policy goals. But in a statutory construction case such as this, we begin with the plain language of the statute.[30] When that language is clear, that is where our inquiry ends.[31] Such is the case here.

IV

Having determined that § 362(c)(3)(A) does not terminate the automatic stay with respect to property of the bankruptcy estate, we conclude that Texas's statute of limitations does not bar Defendants' claim for judicial foreclosure. Under Texas Civil Practice and Remedies Code § 16.035(a), a suit for foreclosure must be brought within four years from the date the statute of limitations began to accrue.[32] Rose claims that the statute of limitations began to accrue on March 26, 2014, the date the Defendants sent the first Notice of Acceleration. Therefore, absent any tolling, the statute of limitations in this case would have expired on March 26, 2018. U.S. Bank filed its counterclaim for judicial foreclosure 179 days after March 26, 2018. The question, then, is whether the bankruptcy stays in this case tolled the statute of limitations more than 179 days.

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[30] *See In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010).
[31] *Id.*
[32] TEX. CIV. PRAC. & REM. CODE § 16.035(a).

The four bankruptcy proceedings in this case lasted at least 269 days. Rose admittedly filed several bankruptcy petitions within one year of each other. However, under the interpretation of § 362(c)(3)(A) of the bankruptcy code that we adopt today, Rose's successive filings did not terminate the action with respect to the property of the bankruptcy estate. There is no debate that the property at issue in this case is part of the bankruptcy estate. Therefore, the stay with respect to the property at issue in this case lasted the duration of the bankruptcy proceedings (269 days), and the statute of limitations was tolled for at least the same. Accordingly, because the Defendants' counterclaim for judicial foreclosure was filed within the 269-day tolling period, it is not barred by the statute of limitations. The district court correctly concluded the same.

* * *

For these reasons, we AFFIRM the district court's judgment.

Appendix B

United States District Court, W.D. Texas, Austin Division.

Sharon D. ROSE, Plaintiff,
v.
SELECT PORTFOLIO SERVICING INC. and Bancorp, Defendants.

Cause No. A-18-CV-491-LY
|
Signed 06/11/2019

ORDER ON REPORT AND RECOMMENDATION

LEE YEAKEL, UNITED STATES DISTRICT JUDGE

Before the court are Plaintiff's Motion for Final Summary Judgment filed January 9, 2019 (Doc. #26) and Defendants' Motion for Summary Judgment on All Claims and Counterclaims and Brief in Support filed February 15, 2019 (Doc. #33), along with all responses and replies. The motions, responses, and replies were referred to the United States Magistrate Judge for findings and recommendations. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W. D. Tex. Appx, C, 1(d). The magistrate judge filed an Report and Recommendation on April 29, 2019 (Doc. #38), recommending that this court deny Plaintiffs motion for summary judgment, grant Defendants' motion for summary judgment, and dismiss with prejudice all of

Plaintiff's claims. The magistrate judge further recommends that this court render Defendants' proposed final judgment and order of foreclosure.

Pursuant to 28 U.S.C. § 636(b) and Rule 72(b) of the Federal Rules of Civil Procedure, a party may serve and file specific, written objections to the proposed findings and recommendations of the magistrate judge within 14 days after being served with a copy of the report and recommendation, and thereby secure a *de novo* review by the district court. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

Plaintiff's Objections to Report and Recommendations of United States Magistrate Judge were filed May 1, 2019 (Doc. #39). Plaintiff's objections include a request for oral hearing. Defendants' Response to Plaintiffs' Objections to Report and Recommendation of the United States Magistrate Judge and Request for Oral Hearing was filed May 15, 2019 (Doc. #40). Plaintiff's Reply on Objections to Report and Recommendation of the United States Magistrate Judge was filed May 17, 2019 (Doc. #41). In light of Plaintiff's objections, the court has undertaken a *de novo* review of the entire case file in this action and finds that the report and recommendation should be accepted and approved for

substantially the reasons stated therein.

Plaintiff objects to the magistrate judge's application of the law on statue of limitations, arguing that a split in authority was not properly addressed by the magistrate judge, and that the magistrate judge failed to address her alternate avenue of prevailing if the court rejected her statute-of-limitations theory. Plaintiff requests oral argument. Defendants oppose oral argument and argue that the magistrate judge correctly followed the law in the Fifth Circuit and the Western District of Texas in concluding that the applicable statute of limitations was tolled during the pendency of Plaintiff's four bankruptcy filings and that Plaintiff failed to prove that the statute of limitations lapsed on Defendants' ability to judicially foreclose asserted in Defendants' counterclaim. The court agrees with Defendants' response. Having reviewed the objections, the court concludes that Defendants have shown they are entitled to summary Judgment on Defendant US Bancorp's judicial-foreclosure counterclaim.

IT IS THEREFORE ORDERED that Plaintiffs Objections to Report and Recommendations of United States Magistrate Judge filed May 1, 2019 (Doc. #39) are **OVERRULED.**

IT IS FURTHER ORDERED that Plaintiff's Request for Oral Hearing filed May 1, 2019 (Doc. #39) is **DENIED.**

IT IS FURTHER ORDERED that the Report and

Recommendation of the United States Magistrate Judge (Doc. #38) is hereby **APPROVED AND ACCEPTED** for the reasons stated herein.[1]

IT IS FURTHER ORDERED that Plaintiff's Motion for Final Summary Judgment filed January 9, 2019 (Doc. #26) is **DENIED.**

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on All Claims and Counterclaims and Brief in Support filed February 15, 2019 (Doc. #33) is **GRANTED AS FOLLOWS:** Plaintiff Sharon D. Rose's claims against Defendants Select Portfolio Servicing, Inc. and US Bancorp are **DISMISSED WITH PREJUDICE.** Summary judgment in rendered in favor of Defendant US Bancorp's judicial-foreclosure counterclaim.

A Final Judgment shall be rendered subsequently.

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[1] The court notes one typographical error in the Report and Recommendation. In the final paragraph of page 8, the Report and Recommendation states that the statute of limitations "expired on March 14, 2018." The correct expiration date was March 26, 2018. The court further notes that despite the typo, the Report and Recommendation correctly calculates the number of days after the expiration based on the March 26, 2018 expiration date.

Appendix C

United States District Court, W.D. Texas, Austin Division.

Sharon D. ROSE, Plaintiff,
v.
SELECT PORTFOLIO SERVICING, INC. and US Bancorp, Defendants.

A-18-CV-491-LY-ML
|
Signed 04/29/2019

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

MARK LANE, UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL UNITED STATES DISTRICT JUDGE:

Before the court are Plaintiff's Motion for Final Summary Judgment (Dkt. #26), Defendants' Motion for Summary Judgment on All Claims and Counterclaims and Brief in Support (Dkt. #33), and all related briefing.[1] After reviewing the pleadings and the

[1] These motions were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

relevant case law, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiff ShaRon Rose ("Rose") filed suit in state court against Defendants Select Portfolio Servicing, Inc. ("SPS") and US Bancorp/U.S. Bank, N.A. ("US Bank")[2] seeking a declaratory judgment to quiet title as to her real property located at 2045 Rachel Lane, Round Rock, TX 78664 (the "Property"). Dkt. #1-4 at ¶¶ 18-19. Rose claimed the Property was subject to an alleged lien serviced by Defendants, but any claim by Defendants was invalid because the statute of limitations for pursuing those claims had expired. *Id.* Defendants removed the case to this court under diversity jurisdiction. Dkt. #1. Rose amended her claims to assert a claim to quiet title and to separately seek a declaratory judgment that the statute of limitations had expired on Defendants' power to seek judicial or nonjudicial foreclosure. Dkt. #24, First Amd. Fed. Compl. ("FAFC"). US Bank asserted a counterclaim for judicial foreclosure of the Property. Dkt. #21.

Rose and her then-husband purchased the Property in 2005 with a purchase-money mortgage. Dkt. #26 ("Rose

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[2] Rose names US Bankcorp as a defendant, and recognizes that US Bank, NA ("US Bank") is a wholly owned subsidiary of US Bancorp. Dkt. #1-4 at ¶¶ 3-4. Rose pleads that US Bank purchased the Deed of Trust relating to the Property at issue. Dkt. #1-4 at ¶ 4. US Bank defends the action and contends it was improperly named as US Bancorp. Dkt. #1 at 1.

MSJ") at ¶ 1, Exhs. A, B. In 2006, they refinanced the loan (the "Loan") secured by the lien (the "Lien"), which was later assigned to US Bank with SPS servicing the Loan. Rose MSJ at ¶ 1; Dkt. #33 ("Defs MSJ") at Exhs 1-A, 1-B. Rose and her husband divorced in 2010. Rose MSJ at ¶ 4, Exh. C. The divorce decree awarded her ex-husband the Property and obligated him to pay the Loan, but subject to a lien he was required to convey to Rose should he default on the Loan. Rose MSJ at ¶ 4, Exhs. C, D. The ex-husband did default on the Loan in or before 2013 and conveyed the Property to Rose in 2016.[3] Rose MSJ at ¶ 4, Exh. G.

On October 1, 2013, Defendants sent a Notice of Default regarding the Loan and the Property. Defs MSJ at Exh. 1-F. On March 26, 2014 Defendants sent a Notice of Acceleration regarding the Loan and the Property setting a May 6, 2014 foreclosure sale. Rose MSJ at Exh. E (March 26, 2014 Notice). On May 5, 2014, Rose obtained a state court TRO barring the May 6, 2014 foreclosure sale. Rose MSJ at Exh. I. The TRO expired on May 19, 2014. On September 29, 2014, Defendants removed that case to this court, where it was dismissed with prejudice on the parties' stipulation on November 25, 2014. *See Rose v. U.S. Bank, N.A.*, CA 1:14-CV-902-LY.

On June 2, 2015, Defendants sent another Notice of Acceleration regarding the Loan and the Property

[3] Although the Property was not conveyed to Rose until February 5, 2016, she was actively involved in litigation concerning foreclosure of the Property as early as 2014. Rose MSJ Exh. I.

setting a July 7, 2015 foreclosure sale. Rose MSJ at Exh. F (all other notices). On January 4, 2016, Rose filed her first bankruptcy matter. Rose MSJ at Exh. L. That matter was dismissed on January 28, 2016 because she failed to timely file a Plan and/or Schedules. *Id.*

On September 1, 2016, Defendants sent another Notice of Acceleration regarding the Loan and the Property setting an October 4, 2016 foreclosure sale. Rose MSJ at Exh. F (all other notices). On October 3, 2016, Rose filed her second bankruptcy matter. Rose MSJ at Exh. M. That matter was discharged on January 25, 2017. *Id.*

On April 3, 2017, Defendants sent another Notice of Acceleration regarding the Loan and the Property setting a June 6, 2017 foreclosure sale. Rose MSJ at Exh. F (all other notices). On June 5, 2017, Rose filed her third bankruptcy matter. Rose MSJ at Exh. N. On July 26, 2017, that matter was dismissed on Rose's own motion. *Id.*

On January 5, 2018, Defendants sent another Notice of Acceleration regarding the Loan and the Property setting a March 6, 2018 foreclosure sale. Rose MSJ at Exh. F (all other notices). On March 2, 2018, Rose filed her fourth bankruptcy matter. Rose MSJ at Exh. O. On May 21, 2018, that matter was also dismissed on Rose's own motion. *Id.*

On May 3, 2018, before her last bankruptcy matter was dismissed, Rose filed this action in state court seeking a declaratory judgment to quiet title as to the Property. Dkt. #1-4. Defendants removed this case on June 8,

2018. Dkt. #1.

On August 2, 2018, Defendants sent another Notice of Acceleration regarding the Loan and the Property setting an October 2, 2018 foreclosure sale. Rose MSJ at Exh. F (all other notices). On September 21, 2018, US Bank filed its counterclaim for judicial foreclosure in this case.[4] Dkt. #18. The Counterclaim seeks judicial foreclosure based on the October 1, 2013 Notice of Default and the August 2, 2018 Notice of Acceleration. Dkt. #18 at ¶ 10.

Rose contends the four-year statute of limitations began to run with the March 26, 2014 Notice of Acceleration rather than the August 2, 2018 Notice of Acceleration because Defendants never rescinded the March 26, 2014 acceleration[5] and still rely on the October 1, 2013 Notice of Default. Rose contends the statute of limitations has run on both the judicial foreclosure remedy and the nonjudicial foreclosure remedy even after tolling periods are properly

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[4] On the same day, US Bank filed an unopposed motion for leave to file its counterclaim, which the court granted the next business day. Dkt. #19. However, leave was not required because there was no Scheduling Order in place at the time. *See* Dkt. #23 (Scheduling Order, entered October 29, 2019). The Clerk's Office then re-docketed the Counterclaim on September 24, 2018. Dkt. #21.

[5] Rose argues "[t]here is no evidence of any agreement by Rose or her ex-husband, on the one hand, and the Lender, on the other, to abandon, revoke, or rescind the March 26, 2014 acceleration, and ShaRon Rose herself did not enter into any such agreement or have knowledge of any such agreement." Rose MSJ at ¶ 13 (citing Exh. K (Decl. of ShaRon Rose)).

counted.[6]

Defendants argue that even assuming March 26, 2014 is the proper date to use to begin accruing the state of limitations, US Bank's counterclaim for judicial foreclosure was timely because the statute of limitations was tolled for 273 days during the bankruptcy proceedings.

Both sides have moved for summary judgment in their favor on both their own claim(s) and the claim(s) asserted against them. Not surprisingly, much of the briefing is duplicative since the same issues are presented in each side's motion for summary judgment. Accordingly, the court will address the parties' motions together.

The court first notes that it appears undisputed that the Loan has been in default since at least March 1, 2011. The court also notes—as the timing of the facts above make obvious—Rose has repeatedly thwarted Defendants' attempts to foreclose by filing for bankruptcy. She now seeks to use the shield of bankruptcy as a sword to claim that Defendants cannot foreclose.

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[6] Rose contends the statute of limitations expired at different times on the two remedies because the previous state-court TRO tolled the nonjudicial foreclosure sale remedy but not the judicial foreclosure remedy.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004).

The court will view the summary judgment evidence in the light most favorable to the non-movant. *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 221 (5th Cir. 2011). The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Miss. River Basin Alliance v.*

Westphal, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id.*

III. APPLICABLE LAW

A suit to quiet title "is an equitable action that involves *clearing* a title of an invalid charge against the title." *Longoria v. Lasater*, 292 S.W.3d 156, 165 n.7 (Tex. App.–San Antonio 2009, pet denied). The elements of the cause of action to quiet title are: (1) an interest in a specific property; (2) title to the property is affected by a claim by the defendant; and (3) the claim, although facially valid, is invalid or unenforceable. *Ocwen Loan Servicing, LLC v. Gonzalez Fin. Holdings, Inc.*, 77 F. Supp. 3d 584, 588 (S.D. Tex. 2015); *Sadler v. Duvall*, 815 S.W.2d 285, 293 n.2 (Tex. App.–Texarkana 1991, writ denied). The plaintiff has the burden of establishing his "superior equity and right to relief," and must prove "right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.–Houston [1st Dist.] 2009, pet. denied). Texas courts have made clear that "a necessary prerequisite to the ... recovery of title ... is tender of whatever amount is owed on the note." *Cook-Bell v. Mortg. Elec. Registration Sys., Inc.*, 868 F. Supp. 2d 585, 591 (N.D. Tex. 2012) (citing *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd n.r.e.)).

To foreclose under a security instrument in Texas with a power of sale, the lender must demonstrate that: (1) a debt exists; (2) the debt is secured by a lien created under Art. 16, § 50(a)(6) of the Texas Constitution; (3) the debtor is in default under the note and security instrument; and (4) the debtor received notice of default and acceleration. TEX. PROP. CODE § 51.002; *Huston v. U.S. Bank Nat'l Ass'n*, 988 F. Supp. 2d 732, 740 (S.D. Tex. 2013), aff'd, 583 F. App'x 306 (5th Cir. 2014); *see also Jones v. Bank of New York Mellon*, 2015 WL 5714636, at *3 (S.D. Tex. Aug. 17, 2015).

IV. ANALYSIS

The issue in this case is whether Defendants' attempt to foreclose is barred by the statute of limitations. Under Section 16.035(b) of the Texas Civil Practice and Remedies Code, "[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.035(a). Similarly, "[a] sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.035(b). After four years from accrual, "the real property lien and a power of sale to enforce the real property lien become void." TEX. CIV. PRAC. & REM. CODE § 16.035(d).

Normally, where a note is payable in installments, the

statute of limitations period begins to run at the maturity date of the final installment. *Id.* § 16.035(e). However, when a loan secured by real property has an acceleration clause, a cause of action accrues "when the holder actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Texas common law imposes notice requirements before acceleration. *Wilmington Tr., Nat'l Ass'n v. Rob*, 891 F.3d 174, 176 (5th Cir. 2018). In Texas, "'[e]ffective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration.'" *Id.* (quoting *Wolf*, 44 S.W.3d at 566). "Both notices must be 'clear and unequivocal.'" *Id.* (quoting *Wolf*, 44 S.W.3d at 566).

Acceleration can be abandoned and the loan's original maturity date restored by the lender's unilateral conduct. *See Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015). "A lender waives its earlier acceleration when it 'put[s] the debtor on notice of its abandonment ... by requesting payment on less than the full amount of the loan.'" *Id.* at 106 (quoting *Leonard v. Ocwen Loan Servicing, LLC*, 616 F. App'x 677, 680 (5th Cir. 2015) (per curiam)). Making an *Erie* guess, the Fifth Circuit has held that the Texas Supreme Court would require a new round of notice to the borrower when a lender re-accelerates after a rescission or abandonment of acceleration. *Rob*, 891 F.3d at 177; *see also Karam v. Brown*, 407 S.W.3d 464, 468 (Tex. App.—El Paso 2013, no pet.) (requiring notice after rescission or abandonment); *Herrera v. Emmis Mortgage*, No. 04-95-00006, 1995 WL 654561, at *4 (Tex. App.—San Antonio 1995, writ denied) (same).

Texas common law tolls the statute of limitations during a bankruptcy stay. *Peterson v. Texas Commerce Bank-Austin, Nat'l Ass'n*, 844 S.W.2d 291, 293–94 (Tex. App. 1992); *see also Jorrie v. Bank of New York Mellon Tr. Co., N.A.*, No. 5:16-CV-490-DAE, 2017 WL 6403054, at *6 (W.D. Tex. Sept. 11, 2017), aff'd, 740 F. App'x 809 (5th Cir. 2018). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") limits the automatic stay in bankruptcy cases where the debtor has been a debtor in a recent previous case:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case[.]

11 U.S.C. § 362(c)(3)(A).

Rose contends the automatic stays in her second and fourth[7] bankruptcy filings were limited to 30 days and

[7] Her second bankruptcy filing was discharged, not dismissed, therefore this section does not apply to the automatic stay during

therefore the statute of limitations was not sufficiently tolled in order for Defendants to enforce the Lien. Defendants argue these provisions only terminate the stay "with respect to the debtor" and not to the property of the bankruptcy estate.

Using March 26, 2014 as the date the statute of limitations began to accrue, absent any tolling, it expired on March 14, 2018. US Bank filed its counterclaim for judicial foreclosure 179 days after the expiration on September 21, 2018. Rose's four bankruptcy proceedings lasted at least 269 days.[8] Thus, when the statute of limitations ran depends on the length of the various bankruptcy stays.

Courts are split on this issue. "One view, ... and sometimes called the majority view, reads the provision to terminate the stay as to actions against the debtor and the debtor's property but not as to actions against property of the bankruptcy estate. Another view, sometimes called the minority view, ... reads the provision to terminate the whole stay." *See In re Smith*, 910 F.3d 576, 581 (1st Cir. 2018); *see also In re Williford*, No. 13-31738, 2013 WL 3772840 (Bankr. N.D. Tex. July 17, 2013) (citing cases following the majority and minority views). In a case of first impression, the First Circuit adopted the minority view. *See Smith*, 910 F.3d at 581. The Fifth Circuit has not addressed the issue, but one court in this District has adopted the

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her third bankruptcy matter. *See* Rose MSJ at § IV.B.3.iv.

[8] Rose contends they lasted 269 days. Rose MSJ at IV.B.3.ii. Defendants count 273 days. Defs MSJ at ¶ 13. The difference is immaterial. *See* Rose MSJ Reply at II.B.

majority view and held the termination of stay does not apply to property of the bankruptcy estate. *In re Scott-Hood*, 473 B.R. 133, 136 (Bankr. W.D. Tex. 2012) ("This court has not found a decision from any court in the Fifth Circuit addressing this particular issue."); *see also Williford*, 2013 WL 3772840 at *2 ("the Fifth Circuit has not addressed this issue").

This court adopts the majority view, which has already been applied in this District where Rose repeatedly filed for bankruptcy, and holds that the termination of the stay does not apply to property of the bankruptcy estate for the same reasons articulated in *Scott-Hood. Scott-Hood*, 473 B.R. at 136-40. "After reviewing both the plain language of the statute itself, as well its narrow context within section 362 and its broader context within the Bankruptcy Code, the court concludes that section 362(c)(3)(A) terminates the stay only with respect to the debtor individually, with respect to the debtor's exempt property that stands as collateral for a debt of the debtor, and with respect to certain leases. It does not terminate with respect to property of the estate." *Id.* at 140. Accordingly, the stay did not terminate with respect to the Property, and the statute of limitations was tolled during the pendency of Rose's four bankruptcy filings. Therefore, US Bank's counterclaim for judicial foreclosure is not barred by limitations.

As described above, Rose repeatedly filed for bankruptcy or sought a temporary injunction just days before Defendants had scheduled a foreclosure sale. Three of Rose's four bankruptcy cases were dismissed

either at Rose's request or because she failed to pursue them. It is clear from the timing of the events that Rose was abusing the bankruptcy system to stop the planned foreclosures. It would be inequitable to allow her to now successfully claim that those automatic stays did not apply to the Property because she had been abusing the system.

The court also rejects Rose's argument that an "implied limitations" should bar US Bank's judicial foreclosure claim. Rose argues that more than four years passed between the October 1, 2013 Notice of Foreclosure and the August 2, 2018 Notice of Acceleration on which US Bank relies in its counterclaim. Rose argues "[i]t is not reasonable for a lender to wait over four years after noticing default to accelerate the note." Rose MSJ at IV.D. Yet Rose also argues Defendants did not abandon the March 26, 2014 acceleration. Rose MSJ at IV.B.4. No party has claimed Defendants abandoned any acceleration, and the facts described above demonstrate that Defendants repeatedly accelerated the loan, Rose repeatedly attempted to thwart the foreclosure, and after each of Rose's failed attempts, Defendants again accelerated the loan. Rose cites no caselaw that requires Defendants to provide a new notice of intent to accelerate after each of Rose's attempts to stop the foreclosure in the absence of any abandonment of the previous acceleration. Rose's argument impossibly ignores all of the events between the October 1, 2013 Notice of Foreclosure and the August 2, 2018 Notice of Acceleration.

Similarly, the court rejects Rose's argument that US

Bank cannot foreclose because it has not established acceleration. Reply to Defs MSJ (#34) at IV.A. Rose seems to argue that the August 2, 2018 Notice of Acceleration is void because the only notice of intent to accelerate is the October 1, 2013 Notice of Default. But again, this argument ignores the events between the October 1, 2013 Notice of Default and the August 2, 2018 Notice of Acceleration. These events demonstrate that Defendants did not abandon any acceleration and materially distinguish this case from *De La Cruz v. Bank of New York*, No, A-17-CV-00163-SS, 2018 WL 3018179, at *5 (W.D. Tex. June 15, 2018), on which Rose relies. For the reasons already stated, this argument fails as well.

Accordingly, Rose has failed to show the statute of limitations has lapsed on Defendants' ability to judicially foreclose. Rose's motion also seeks summary judgment on her contention that limitations have passed on Defendants' ability to pursue a non-judicial foreclosure sale. The court agrees that remedy is foreclosed, even including an additional 14 days of tolling for the TRO issued in the first suit, but Defendants have abandoned that remedy in order to pursue judicial foreclosure. The undersigned will recommend that Rose's motion for summary judgment be denied. Defendants have shown that they are entitled to tolling of the statute of limitations and therefore Rose's claims to quiet title and for declaratory judgment fail. Defendants have shown they are entitled to summary judgment on US Bank's judicial foreclosure counterclaim. Accordingly, the undersigned will recommend that Defendants' motion

for summary judgment be granted and Defendants' proposed Final Judgment (Dkt. #33-9) be issued by the District Court.

V. CONCLUSION

"The history of this case demonstrates beyond cavil that [Rose] has spent [nearly five] years gaming the system through a series [baseless bankruptcy actions and civil suits]. Doing so has enabled [Rose] to achieve [her] one overarching goal: [avoiding foreclosure on a property] with little or no payment on [the] mortgage debt." *See Germain v. US Bank Nat'l Assoc.*, —— F.3d ——, No. 18-10508, 2019 WL 1467053, at *6 (5th Cir. Apr. 3, 2019). Rose has "used the intended shield[s] of [litigation and bankruptcy] as a sword" to avoid foreclosure of her encumbered house. *See id.* The court "caution[s] [Rose], and [her] present and future counsel, if any, that further machinations to prolong this litigation or delay foreclosure proceedings could and likely will be met with sanctions." *Id.*

VI. RECOMMENDATIONS

The undersigned **RECOMMENDS** that the District Court **DENY** Plaintiff's Motion for Final Summary Judgment (Dkt. #26).

The undersigned further **RECOMMENDS** that the District Court **GRANT** Defendants' Motion for Summary Judgment on All Claims and Counterclaims and Brief in Support (Dkt. #33), **DISMISS** Rose's claims **WITH PREJUDICE**, and issue Defendants'

proposed Final Judgment and Order of Foreclosure (Dkt. #33-9).

VII. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

Appendix D

List of Minority/Majority Holdings by Circuit

1st Circuit

MINORITY

- *Smith. v. Maine Bureau of Revenue Services (In re Smith)*, 910 F.3d 576 (1st Cir. 2018)
- *St. Anne's Credit Union v. Ackell*, 490 B.R. 141 (D. Mass. 2013)

MAJORITY

- *Witkowski v. Knight (In re Witkowski)*, 523 B.R. 291 (B.A.P. 1st Cir. 2014), *abrogated by In re Smith*, 910 F.3d 576 (1st Cir. 2018)
- *Jumpp v. Chase Hone Finance, LLC (In re Jumpp)*, 356 B.R. 789 (B.A.P. 1st Cir. 2006), *abrogated by In re Smith*, 910 F.3d 576 (1st Cir. 2018)
- *In re Pope*, 351 B.R. 14 (Bankr. D.R.I. 2006), *abrogated by In re Smith*, 910 F.3d 576 (1st Cir. 2018)
- *Checkroun v. Weil (In re Weil)*, Bankr. L. Rep. (CCH) ¶ 82480, 2013 WL 1798898 (D. Conn. 2013), *abrogated by In re Smith*, 910 F.3d 576 (1st Cir. 2018)

2d Circuit

MINORITY

- *In re Goodrich*, 587 B.R. 829 (Bankr. D. Vt. 2018)
- *Connecticut Housing Finance Authority v. Wilson (In re Wilson)*, No. 13-21001, 2014 WL 183210 (Bankr. D. Conn. Jan. 15, 2014)

MAJORITY

- *In re Rice*, 392 B.R. 35 (Bankr. W.D.N.Y. 2006)
- *In re Martino*, No. 09-CV-0645, 2009 WL 1706703 (N.D.N.Y. June 17, 2009)

3d Circuit

MAJORITY

- *In re Williams*, 346 B.R. 361 (Bankr. E.D. Pa. 2006)
- *Bankers Trust Co. of California v. Gillcrese (In re Gillcrese)*, 346 B.R. 373 (Bankr. W.D. Pa. 2006)
- *U.S. Bank National Associate v. Mortimore (In re Mortimore)*, No. BR 10-21021, 2011 WL 6717680 (D.N.J. Dec. 21, 2011)
- *In re Simonson*, No. 06-22833, 2007 WL 703542 (Bankr. D.N.J. Mar. 2, 2007)

4th Circuit

MINORITY

- *In re Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006)
- *In re Akwa*, No. 15-26914-PM, 2016 WL 67219 (Bankr. D. Md. Jan. 5, 2016)
- *In re Adams*, No. CA 12-01394, 2012 WL 1596720 (Bankr. D.S.C. May 7, 2012)
- *In re Fleming*, 349 B.R. 444 (Bankr. D.S.C. 2006)
- *In re Dev*, 593 B.R. 435 (Bankr. E.D.N.C. 2018)

MAJORITY

- *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006)
- *In re Brandon*, 349 B.R. 130 (Bankr. M.D.N.C. 2006)

- *In re Wood*, 590 B.R. 120 (Bankr. D. Md. 2018)
- *In re Tubman*, 364 B.R. 574, Bankr. L. Rep. (CCH) ¶ 79725 (Bankr. D. Md. 2007)
- *In re Carpenter*, No. 10-03870-8, 2010 WL 3744337 (Bankr. E.D.N.C. Sept. 15, 2010)
- *In re Burnette*, No. 09-0699-8, 2009 WL 961807 (Bankr. E.D.N.C. Apr. 2, 2009)
- *In re Matthews*, No. 13-10521, 2013 WL 1385221 (Bankr. E.D. Va. Apr. 3, 2013)
- *In re McGrath*, No. 10-20530, 2011 WL 2116992 (Bankr. E.D. Va. Jan. 25, 2011)
- *In re Taylor*, No. 07-31055, 2007 WL 1234932 (Bankr. E.D. Va. Apr. 26, 2007)

5th Circuit

MAJORITY

- *Rose v. Select Portfolio Servicing*, 945 F.3d 226 (5th Cir. 2019)
- *In re Scott–Hood*, 473 B.R. 133 (Bankr. W.D. Tex. 2012)
- *In re Gautreaux*, No. 14-10226, 2014 WL 4657433 (Bankr. E.D. La. Sept. 16, 2014)
- *In re Williford*, No. 13-31738, 2013 WL 3772840 (Bankr. N.D. Tex. July 17, 2013)

6th Circuit

MAJORITY

- *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006)
- *In re Murray*, 350 B.R. 408 (Bankr. S.D. Ohio 2006)
- *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006)

- *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006)
- *In re McKeal*, No. 14-62113, 2014 WL 6390712 (Bankr. N.D. Ohio Nov. 14, 2014)
- *In re Robinson*, 427 B.R. 412 (Bankr. W.D. Mich. 2010)
- *In re Smith*, 596 B.R. 872 (Bankr. E.D. Tenn. 2009)
- *In re Dowden*, 429 B.R. 894 (Bankr. S.D. Ohio 2010)
- *In re Markoch*, 583 B.R. 911 (Bankr. W.D. Mich. 2018)

7th Circuit

MINORITY

- *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009)
- *In re Curry*, 362 B.R. 394 (Bankr. N.D. Ill. 2007)
- *In re Wade*, 592 B.R. 672 (Bankr. N.D. Ill. 2018), *petition for cert. docketed*, No. 19-320 (U.S. Sept. 10, 2019)

8th Circuit

MINORITY

- *In re Cannon*, 365 B.R. 908 (Bankr. E.D. Mo. 2007)

MAJORITY

- *In re Stanford*, 373 B.R. 890 (Bankr. E.D. Ark. 2007)

9th Circuit

MINORITY

- *Reswick v. Reswick et al (In re Reswick)*, 446 B.R. 362 (B.A.P. 9th Cir. 2011)
- *Vassallo v. Naiman*, No. Civ. 11-2022, 2012 WL 691783 (E.D. Cal. Mar. 2, 2012)
- *Ortola v. Ortola et al (In re Ortola)*, No. BAP CC-11-1222, 2011 WL 7145793 (B.A.P. 9th Cir. Dec. 16, 2011)
- *In re Furlong*, 426 B.R. 303 (Bankr. C.D. Ill. 2010)
- *In re Hart*, No. 12-21220, 2012 WL 6644703 (Bankr. D. Idaho Nov. 23, 2012)
- *In re Whitescorn*, No. BR13-60159, 2013 WL 1121393 (Bankr. D. Or. Mar. 14, 2013)
- *Vitalich v. Bank of New York Mellon*, 569 B.R. 502, Bankr. L. Rep. (CCH) P 82994 (N.D. Cal. 2016)

MAJORITY

- *In re Alvarez*, 432 B.R. 839 (Bankr. S.D. Cal. 2010)
- *Rinard v. Positive Investments, Inc. (In re Rinard)*, 451 B.R. 12 (Bankr. C.D. Cal. 2011)
- *In re Graham*, No. 07-62339, 2008 WL 4628444 (Bankr. D. Or. Oct. 17, 2008)

10th Circuit

MAJORITY

- *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813 (B.A.P. 10th Cir. 2008)
- *In re Bell*, No. 06-11115, 2006 WL 1132907 (Bankr. D. Colo. Apr. 27, 2006)

- *In re Rodriguez*, 487 B.R. 275 (Bankr. D.N.M. 2013)
- *In re Hollingsworth*, 359 B.R. 813 (Bankr. D. Utah 2006)
- *In re Montoya*, 333 B.R. 449 (Bankr. D. Utah 2005)
- *LSF9 Master Participation Trust v. Sanchez*, 450 P.3d 413 (N.M. Ct. App. 2018)

11th Circuit

MINORITY

- *In re Keeler*, 561 B.R. 804 (Bankr. N.D. Ga. 2016)

MAJORITY

- *Abernathy, LLC v. Smith*, No. 13-CV-03801, 2014 WL 4925654 (N.D. Ga. Sept. 30, 2014)
- *In re Drakeford*, No. 06-BK-02563, 2007 WL 2142842 (Bankr. M.D. Fla. Jan. 17, 2007)
- *Matter of Houchins*, No. 14-11928, 2014 WL 7793416 (Bankr. N.D. Ga. Oct. 29, 2014)
- *Milledge v. Milledge (In re Milledge)*, No. BKR-08-62839, 2008 WL 7866897 (Bankr. N.D. Ga. Apr. 10, 2008)
- *In re Ajaka*, 370 B.R. 426 (Bankr. N.D. Ga. 2007)
- *In re Roach*, 555 B.R. 840 (Bankr. M.D. Ala. 2016)