By Michael Miller

Untangling the Web of § 362(c)(3)(A) and Its Legislative History

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Courts have been struggling with the interpretation of § 362(c)(3)(A) since its inception by the Bankruptcy Abuse Prevention and Consumer Act of 2005 (BAPCPA). Section 362(c)(3)(A) is triggered when a debtor files a chapter 7, 11 or 13 but has had a dismissed case in the last 12 months. Within 30 days, the debtor must move to extend the stay with a showing that the case was filed in good faith.[1] If the debtor fails to extend the stay, then it terminates; however, to what extent the stay terminates has caused a conflict in the courts.

The majority view has read § 362(c)(3)(A) plainly and hold that the stay only terminates as to the debtor and the debtor's property, leaving the stay intact as to property of the estate. Since the majority view finds the language of § 362(c)(3)(A) unambiguous, they spend little to no time discussing the murky legislative history; this is unnecessary when you have a plain reading. Other courts, often referred to as the minority view, read the section as being ambiguous, thereby attempting to use legislative history to support terminating the entire stay.

Despite a culmination of almost 100 cases between the majority and minority courts over the course of 15 years, the issue has only just reached two circuit courts. In December 2018, the First Circuit was the initial court to rule on the issue in the *Smith* case, which was in the minority view's favor.[2]

Fifth Circuit Creates a Split in an Unusual Twist

Exactly 12 months after the First Circuit's decision, in December 2019, the Fifth Circuit, with the *Rose* case, created a split that was in the majority view's favor.[3] The *Rose* case was completely under the radar, as it did not arise out of a bankruptcy, but rather from a state foreclosure case that was removed to the Western District of Texas.[4] The debtor was facing foreclosure from the mortgage creditor and had filed four separate bankruptcies. In two of the bankruptcies, which followed recently dismissed cases, the debtor never extended the stay under § 362(c)(3)(A). There is a four-year statute of limitations for a mortgage creditor to foreclose in Texas; however, Texas also tolls the statute of limitations while a debtor is in bankruptcy.

The debtor brought a quiet title action against her lender. Her position — pursuant to the minority view — was that during the two of her bankruptcies where she did not extend the stay, the entire stay terminated, thus there was no stay for 135 of the 269 days she was in her cases following the expiration of the stay. In response, the mortgage creditor argued that under the majority view, there was still a stay to the property of the estate that included the debtor's home, and therefore the statute of limitations was not tolled for the entire 269 days she was in her bankruptcies.

Based on the number of days both sides were arguing, if the majority view was followed, the mortgage creditor would prevail and foreclose on the debtor's home; if the minority view was followed, the debtor would prevail. This presented a very unusual situation because it had the mortgage creditor arguing for the debtor-friendly majority view, whereas the debtor was arguing for the creditor-friendly minority view. Ultimately, the mortgage creditor prevailed in district court, and the opinion was affirmed by the Fifth Circuit — a creditor victoriously affirming the majority-debtor view. While this opinion was unfortunate for this particular debtor, it represented a sacrificial victory for future debtors.

Majority View's Contextual Reading

The majority view clearly reads a termination of the stay to the debtor and the debtor's property, especially in light of the fact that the terms "debtor" and "property" both appear within the structure of § 362(c)(3)(A). In addition, under a plain reading of § 362(c)(3)(A), each action referenced in § 362(a) regarding debts, or *property* securing such debts or leases, is terminated "with respect to the debtor" only.[5] This translates to a reading that the stay does terminate any subsections under § 362(a) that protect the debtor[6] — and the debtor's property.[7] Any subsections that fall under § 362(a) that protect the property of the bankruptcy estate are left intact.[8]

Moreover, the majority view's plain reading is bolstered by § 362(c)(4)(a)(i), which is also a refiling Bankruptcy Code provision that immedi-

1 11 U.S.C. § 362(c)(3)(B).
2 *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018).
3 *Rose v. Select Portfolio Servicing Inc.*, 945 F.3d 226 (5th Cir. 2019).
4 *Id.* at *3.
5 *In re Tubman*, 364 B.R. 574, 582 (Bankr. D. Md. 2007).
6 *See* § 362(a)(1), (2), (6) and (7).
7 *See* § 362(a)(5).
8 *See* § 362(a)(3) and (4).

ately follows § 362(c)(3)(A). Section 362(c)(4)(a)(i) terminates the entire stay without qualification for any debtor who has had two or more dismissed cases in the past 12 months by stating in just 16 words that the "stay under subsection (a) shall not go into effect upon the filing of the later case." The minority view believes that § 362(c)(3)(A) terminates the entire stay just as § 362(c)(4)(a)(i) does, but the stark differences between these neighboring statutes that were both enacted on the same exact date shows that Congress knew how to terminate the entire stay, but chose not to do so under § 362(c)(3)(A) because it used qualifying language instead.[9]

The Minority View's Contextual Reading: Does It Even Have One?

The minority view contends that the majority view fails to parse a plain reading that § 362(c)(3)(A) terminates the stay to the debtor's property and only terminates the stay as to the debtor, and is therefore ambiguous. Most of the minority-view cases contend that they could read a plain-meaning interpretation of § 362(c)(3)(A) that unambiguously terminated the stay in its entirety by relying on the spousal exclusion theory, which contends that the phrase "with respect to the debtor" clarifies the beginning of § 362(c)(3)(A),[10] and thereby does not apply to the refiling debtor's first-time filing spouse in a joint case.[11]

However, the First Circuit found this theory implausible in agreement with the majority view, since joint bankruptcies are jointly administered but keep the rights of the two debtors separate.[12] In addition, the First Circuit admitted that it could not get to a plain reading of termination of the entire stay.[13] Therefore, the minority view fails to get to a plain reading that its view terminates the entire stay, especially in light of the fact that the term "estate" appears nowhere in the text of § 362(c)(3)(A).[14]

The Unenacted Legislative History Behind § 362(c)(3)(A)

It is well-settled canon that if a Bankruptcy Code provision is unambiguous and clear, the plain language controls, and a court should not turn to legislative history.[15] Despite the majority view interpreting a plain meaning, the *Smith* court — along with the rest of the minority view cases — inappropriately turn to the legislative history behind § 362(c)(3)(A).

The legislative history surrounding BAPCPA is very sparse and contains nothing more than a singular House Report from 2005,[16] most of which is nothing more than a regurgitation of BAPCPA's text.[17] BAPCPA's legislative history is missing all the traditional reports that normally accompany a rich legislative history, such as a conference report, Senate committee report and floor statements. This minimal amount of legislative history would be difficult to qualify as assistance in statutory interpretation.

Overemphasis on Legislative History

Due to the limited amount of legislative history, the minority view backtracks to eight years before BAPCPA to look at *proposed* and *unenacted* pieces that start in 1994 with the Bill Clinton administration and the 104th Congress, then end in 2005 with the George W. Bush administration and the 109th Congress.[18] As one court put it, tracing back the eight-year proposed legislative history of BAPCPA is torturous.[19]

It all started in 1994, when a National Bankruptcy Conference (NBC) Commission was created by Congress to investigate problems in the bankruptcy system and suggest possible solutions.[20] Subsequently, after three years, the NBC Commission issued a report with its findings.[21] In regard to repeat filers, the NBC Commission Report listed an array of reasons that cause debtors to refile bankruptcies, such as the loss of employment, stopping mortgage foreclosures and stopping evictions.[22]

The U.S. Supreme Court and Seventh Circuit have cautioned courts from selectively choosing and emphasizing isolated snippets from legislative history as a way to manipulate statutory interpretation of a Code provision to conform with its view.[23] The minority view selectively extracts a snippet from the NBC Commission Report, discussing that one of the many reasons why debtors refile chapter 13 is to stop mortgage foreclosures and evictions, and makes the leap that this meant that Congress wanted to terminate the entire stay under § 362(c)(3)(A).[24] However, this snippet is not about the specific language of § 362(c)(3)(A), and the NBC Commission Report never suggests any concerns with second-time repeat filers, nor did it propose any recommendations that resemble how § 362(c)(3)(A) operates.

The NBC Commission Report simply suggested that evidence on causes of refiling were not conclusive enough to warrant a drastic change, and a "more moderate approach would suffice."[25] The more moderate solution that the NBC Commission Report comes up with is to amend § 362 to state that if a debtor is refiling a third case within six years and had been a debtor within 180 days of the instant case, the debtor would receive no stay upon filing unless the debtor imposes one for cause.[26] This proposed recommendation resembles what eventually became the enacted version of § 362(c)(4)(A)(i), which applies to a third-time refiling debtor who receives no stay upon filing a third case within 12 months and must move to impose it. The NBC Commission also recommended amending § 362 to add

9 *Rose*, 945 F.3d at *7-8.
10 The beginning of § 362(c)(3)(A) states, "if a single or joint case is filed by or against debtor…."
11 *Reswick v. Reswick (In re Reswick)*, 446 B.R. at 369-71 (B.A.P. 9th Cir. 2011).
12 *Smith*, 910 F.3d at 584-85.
13 *Id.* at 581.
14 *Id.* at *7.
15 *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).
16 *In re Scott-Hood*, 473 B.R. 133, 140 n.2. *See also* H.R. Rep. No. 109-31(1) (2005), *available at* congress.gov/congressional-report/109th-congress/house-report/31/1 (unless otherwise specified, all links in this article were last visited on Feb. 24, 2020).
17 *Id.*
18 *Smith*, 910 F.3d at 589-90; Daniel, 404 B.R. at 327-29.
19 *In re Quevedo*, 345 B.R. 238, 243 (Bankr. S.D. Cal. 2006).
20 Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, §§ 602-03 (Oct. 22, 1994).
21 Nat'l Bankr. Review Comm'n, Report of the Nat'l Bankr. Review Comm'n (Oct. 20, 1997), pp. 276-80, *available at* govinfo.library.unt.edu/nbrc/reportcont.html.
22 *Id.*
23 *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005); *see also In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989).
24 *Smith*, 910 F.3d at 590; *Daniel*, 404 B.R. at 327.
25 *See supra* n.28.
26 *Id.*

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an *in rem* order-relief statute preventing a stay from going into effect on a specific piece of property or lease for up to six years when a debtor is found to be engaged in a scheme to transfer a property interest to avoid a foreclosure or eviction.[27] This proposed recommendation resembles what eventually became the enacted version of § 362(d)(4).

In 1998, the House and Senate Judiciary Committee Reports came out. In these reports, under a section entitled "Discouraging Bad Faith Repeat Filings," proposed legislation for §§ 362(c)(3)(A), 362(c)(4)(A)(i) and 362(d)(4) are contained.[28] Subsequently, several more proposed legislative pieces came out in the following years that were vetoed and never enacted, but they all contained the same proposed legislation for §§ 362(c)(3)(A), 362(c)(4)(A)(i) and 362(d)(4).[29] The minority view argues that because proposed language for § 362(c)(3)(A) is under this section, Congress meant to terminate the entire stay, and that this must be the case to meet the legislative intent of deterring repeat filers.[30] However, the minority view completely ignores the fact that § 362(c)(3)(A) is not the only proposed solution under this section, and that §§ 362(c)(4)(A)(i) and 362(d)(4) also deter repeat filings.[31]

Lastly, in 2005, Senate Bill No. 25632, enacting BAPCPA, was published along with the Judiciary House Report,[33] which became the only actual implemented forms of legislation surrounding BAPCPA and § 362(c)(3)(A).[34] These two pieces did nothing more than reiterate the language of the newly enacted §§ 362(c)(3)(A), 362(c)(4)(A)(i) and 362(d)(4).

The annals of the long and murky unenacted legislative history behind § 362(c)(3)(A), which spans eight years, do nothing more than tell us that the proposed language for § 362(c)(3)(A) was implemented by BAPCPA into the Bankruptcy Code. It also tells us that we know to some extent that not just § 362(c)(3)(A), but also §§ 362(c)(4)(a)(I) and 362(d)(4), were discussed as being measures to combat repeat and abusive filings. Unfortunately, none of these proposed legislative pieces offered any explanation as to what extent the stay should terminate under § 362(c)(3)(A), and the language from most of these reports is exactly what was enacted into the Code.

Conclusion

Even if the majority view is correct that § 362(c)(3)(A) has a plain meaning, and a court should not review the legislative history, sometimes the Supreme Court does consult the history to make sure its interpretations are consistent with the purpose of Congress.[35] However, to the extent a court does dive into the legislative history behind § 362(c)(3)(A), the majority view would still prevail.

The majority view is supported by the legislative history. Looking at §§ 362(c)(3)(A), 362(c)(4) and 362(d)(4) together, the legislative history supports a graduated method of preventing successive filings by showing that it had more than one way to curb these kinds of cases, and wanted to do so with different levels of punitive measures — from the least punitive measure (§ 362(c)(3)(A)) to an intermediate punitive measure (§ 362(c)(4)(a)(i)) to the most severe punitive measure (§ 362(d)(4)).

Even if we could go back in time and ask each and every congressional member from the five different Congresses[36] what they intended to achieve with § 362(c)(3)(A), this still would not matter, because a court should apply the text of the Code, which both Houses of Congress approved and the President signed, and not themes from a history that was neither passed by a majority of either House nor signed into law.[37] The court's job is to apply the text, not improve it, and if Congress enacted something into law different than what was intended, then it should amend the statute to conform to its intent.[38]

A petition for a *writ of certiorari* was recently filed on this issue by the appellant in the *Rose* case.[39] Since there is now a split, it may also be ripe to have the Supreme Court finally resolve this entrenched issue which has divided courts throughout the nation for more than 15 years. abi

27 *Id.* at 282-88.
28 House Judiciary Comm. Report No. 105-540, on H.R. 3150, § 121, pp. 15-16, *available at* congress.gov/congressional-report/105th-congress/house-report/540; Senate Judiciary Comm. Report No. 105-253, S. 1301, § 303, pp.7-8, *available at* congress.gov/congressional-report/105th-congress/senate-report/253/1.
29 1998 House Conference Report No. 105-794, on H.R. 3150, § 119, pp. 20-23, *available at* congress.gov/105/crpt/hrpt794/CRPT-105hrpt794.pdf; 1999 Judiciary House Report No. 106-123, pp. 13-15; *available at* congress.gov/106/crpt/hrpt123/CRPT-106hrpt123-pt1.pdf; 2002 House Conference Report No. 107-617, pp. 53-56; *available at* congress.gov/107/crpt/hrpt617/CRPT-107hrpt617.pdf; 2003 Judiciary Committee Report No. 108-40, pp.36-38; *available at* congress.gov/108/crpt/hrpt40/CRPT-108hrpt40-pt1.pdf.
30 *Smith*, 910 F.3d at 590; *Daniel*, 404 B.R. at 327-28.
31 *See supra* n.34 and 35.
32 Senate Bill No. 256, §§ 302 and 303, pp. 131-139, *available at* congress.gov/109/bills/s256/BILLS-109s256is.pdf.
33 *See supra* n.22.
34 Judiciary Committee House Report H.R. Rep. No. 109-31(I) (2005), pp. 69-70, *available at* congress.gov/109/crpt/hrpt31/CRPT-109hrpt31.pdf.
35 *Ransom v. FIA Card Servs.*, 562 U.S. 61, 71 (2011).
36 The legislative history starts with the 104th Congress and ends with the 109th Congress.
37 *Peterson v. Somers Dublon Ltd.*, 729 F.3d 741, 749 (7th Cir. 2013).
38 *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004).
39 *See Rose v. Select Portfolio Servicing*, 19-50598; 2020 U.S. S. Ct. Briefs LEXIS 668.