Section 362(c)(3)(A): How Far Does the Automatic Stay Extend?

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I. Introduction

Section 362(c)(3) was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") which was enacted by Congress to correct perceived abuses in the bankruptcy system. More than a decade before the enactment of BAPCPA, Congress created a National Bankruptcy Review Commission to study problems related to the Code and to recommend solutions.[1] In response to the Commission's recommendations, the House Judiciary Committee recommended amending section 362(c) to add paragraph (3) with language nearly identical to that set forth in section 362(c)(3)(A).[2] The committee report explained that:

> The filing of a bankruptcy case causes the immediate imposition of an automatic stay, which prevents creditors from pursuing actions against debtors and their property. In light of this, some debtors file successive bankruptcy cases to prevent secured creditors from foreclosing on their collateral.
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> The amendment to section 362(c) remedies this problem by terminating the automatic stay in cases filed by an individual debtor under chapters 7, 11, and 13 if his or her prior case was dismissed within the preceding year. In the subsequently filed bankruptcy case, the automatic stay terminates 30 days following the filing date of the case unless the court, upon request of a party in interest, grants an extension.[3]

Thus, as explained below, the bankruptcy courts, district courts, bankruptcy appellate panels and two circuits have differed as to what this fifteen-year old section actually means.[4] Does the absence of the automatic stay in the event it is not extended within 30 days or imposed after

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[1] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602-03 & 608, 108 Stat. 4106 (1994).

[2] *See* H.R.REP. NO. 105-540l, at 15-16 (1998).

[3] *Id.* at 80.

[4] In re Daniel, 404 B.R. 318 (Bankr.N.D. Ill 2009) and In re Smith, 573 B.R. 298 (2017) both provide excellent analysis of the legislative history of this section.

notice and a hearing mean that it does not extend to the debtor, the debtor's property or to the estate?

II. Section 362(c)(3)(A) Circuit Split

The Supreme Court recently denied a petition for certiorari to resolve the circuit split on the proper interpretation of Section 362(c)(3)(A).[5] The issue is whether the automatic stay terminates after 30 days with respect to property of the estate for an individual who refiles after having a petition under chapters 7, 11, or 13 dismissed within the past year.[6] Two main approaches to the issue have emerged.[7] Under the majority view, the automatic stay terminates after 30 days only with respect to actions against the debtor and the debtor's property, but remains in effect with respect to property of the estate.[8] Conversely, under the minority view, the automatic stay terminates in its entirety after 30 days.[9] The First Circuit adopted the minority view in *Smith v. Maine Bureau of Revenue Services* and then the Fifth Circuit created a circuit split when it adopted the majority approach in *Rose v. Select Portfolio Services*.[10]

Though only two circuits have ruled on the issue, its importance cannot be overlooked. As a threshold matter, repeat filings are common, so courts frequently must interpret section

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[5] Rose v. Select Portfolio Servicing, 945 F.3d 226 (5th Cir. 2019), *cert. denied*.

[6] *See* 11 U.S.C. §362(c)(3)(A) (2012); *see also, e.g.*, *id.* at 229*;* Smith v. Maine Bureau of Revenue Servs. (In re Smith), 910 F.3d 576, 578 (1st Cir. 2018).

[7] *See, e.g., Rose,* 945 F.3d at 230.

[8] *See, e.g.*, *id.;* Holcomb v. Hardeman (In re Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008).

[9] *See, e.g.*, *Smith*, 910 F.3d at 591; Reswick v. Reswick (In re Reswick), 446 B.R. 362, 367-68 (B.A.P. 9th Cir. 2011).

[10] *Rose*, 945 F.3d at 230; *Smith*, 910 F.3d at 591.

362(c)(3)(A). [11] For example, in chapter 13 cases in 2019 alone, 22,895 petitions were refiled after dismissal.[12] As a result, over 50 district and bankruptcy courts, as well as a bankruptcy appellate panel, have adopted the majority view. [13] Meanwhile approximately 20 lower courts, including one bankruptcy appellate panel, have adopted the minority view.[14] Further, once courts are confronted with this issue, their decision to maintain stay protection with respect to property of the estate is critical because property of the estate consists of all "legal or equitable interests of the debtor in property."[15] In short, this issue frequently arises and deals with a fundamental protection of most assets within a case.

III. Majority View

The majority view finds that by the plain meaning of Section 362(c)(3)(A) the automatic stay does not terminate with respect to property of the estate.[16] The majority bases its

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[11] 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).

[12] UNITED STATES COURTS, BAPCPA REPORT- 2019, (July 27, 2020), https://www.uscourts.gov/statistics-reports/bapcpa-report-2019.

[13] *See, e.g.*, *Rose*, 945 F.3d at 230; *Holcomb,* 380 B.R. at 816; In re Wood, 590 B.R. 120, 126 (Bankr. D.Md. 2018); In re Roach, 555 B.R. 840, 848 (Bankr. M.D. Ala. 2016); Rinard v. Positive Investments, Inc. (In re Rinard), 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011); In re Stanford, 373 B.R. 890, 895 (Bankr. E.D. Ark. 2007); Bankers Trust Co. of California v. Gillcrese (In re Gillcrese), 346 B.R. 373, 377 (Bankr. W.D. Pa. 2006); In re Moon, 339 B.R. 668, 673 (Bankr. N.D. Ohio 2006); In re Rice, 392 B.R. 35, 38 (Bankr. W.D.N.Y. 2006).

[14] *See, e.g.*, *Smith,* 910 F.3d at 591; *Reswick*, 446 B.R. at 367-68; In re Goodrich, 587 B.R. 829, 847 (Bankr. D. Vt. 2018); In re Keeler, 561 B.R. 804, 807-08 (Bankr. N.D. Ga. 2016); In re Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009); In re Cannon, 365 B.R. 908, 910 (Bankr. E.D. Mo. 2007); In re Jupiter, 344 B.R. 754, 762 (Bankr. D.S.C. 2006).

[15] 11 U.S.C. § 541(a)(1) (2012); *see also* In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993) (property of the estate includes "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative").

[16] *See, e.g.*, *Rose,* 945 F.3d at 229-30.

interpretation on the rule that where there is a plain meaning, courts must give effect to it.[17] As a first step, the majority lays out the three categories to which the automatic stay applies: actions against (1) the debtor, (2) property of the debtor, and (3) property of the estate.[18] Then, the majority reasons that Congress included the phrase "with respect to the debtor" to make 362(c)(3)(A) applicable to the first two categories and intentionally omitted any reference to the estate so that termination would not be applicable to the third category.[19]

The majority bolsters its argument through reference to other sections of the Bankruptcy Code, canons of construction, and policy goals of the Bankruptcy Code. First, the plain meaning becomes even clearer once one looks at nearby sections that unambiguously terminate the stay through language that says the automatic stay "shall not go into effect upon the filing of the later case," or "the stay provided by subsection (a) is terminated."[20] If Congress intended Section 362(c)(3)(A) to operate as a total termination, they would have used similar language instead of adding the phrase "with respect to the debtor."[21] The minority view reads this phrase out of the

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[17] Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd- is to enforce it according to its terms.") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

[18] *See* 11 U.S.C. §362(a) (2012); *Rose*, 945 F.3d at 230 ("§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.") .

[19] *See Rose,* 945 F.3d at 230 ("There is no mention of the bankruptcy estate, and we decline to read in such language."); Hardy v. New York City Health & Hosp. Corp., 164 F.3d 789, 794 (2d Cir. 1999) (using "the familiar principle of *expressio unius est exclusio alterius,* the mention of one thing implies the exclusion of the other to interpret a statute").

[20] 11 U.S.C. § 362(c)(4) (2012); 11 U.S.C. §362(h)(1); *see* In re Williford, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013) ("Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute.").

[21] *See* In re Holcomb, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008) ("If Congress meant to terminate the stay in its entirety, it would have done so in plain language as it did in § 362(c)(4)(A)(i).").

statute, which violates the canon that Congress intends each word and does not create surplusage.[22]

The majority view also protects the parties and upholds the goals of the Bankruptcy Code.[23] The automatic stay is in place in part to ensure a maximum equitable distribution of assets to creditors.[24] Without the automatic stay, a race to the courthouse would ensue and a small amount of creditors would take all the assets of the estate leaving other creditors without anything.[25] Additionally, in a chapter 7 case the automatic stay helps the trustee carry out its duty to distribute assets to creditors.[26] The majority thus protects parties regardless of the actions of a potentially bad-faith debtor where the minority would harm them by terminating the stay entirely.[27]

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[22] *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995) (stating that courts have "a reluctance to treat statutory terms as surplusage"); *Holcomb*, 380 B.R. at 815 (laying out the minority interpretation that says "the phrase is superfluous").

[23] *See, e.g.*, *Rose*, 945 B.R. at 231; *Holcomb*, 380 B.R. at 815. *But see* In re Roach, 555 B.R. 840, 847 (Bankr. M.D. Ala. 2016) ("The Court acknowledges that the majority interpretation leaves § 362(c)(3)(A) a relatively toothless remedy against repeat filers…but it is not so toothless as to be absurd.")

[24] *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994) ("Those policies of obtaining a maximum and equitable distribution for creditors and ensuring a 'fresh start' for individual debtors…are at the core of federal bankruptcy law.").

[25] *See*, *e.g.*, In re Rinard, 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011) (explaining that under the minority view "a creditor race to the courthouse exists").

[26] *See infra* Part IV.

[27] *See, e.g.*, *Holcomb*, 380 B.R. at 815 (holding that maintaining the stay protects creditors and the trustee while courts who follow the minority interpretation lose such benefits).

IV. Minority View

Conversely, the minority view, followed by certain bankruptcy courts in the Seventh Circuit,[28] finds section 362(c)(3)(A) ambiguous and uses legislative history and purpose to support the conclusion that Congress intended to terminate the automatic stay in its entirety after 30 days.[29] In particular the minority reasons that the key phrase "with respect to the debtor" does not compel the majority's conclusion because it was not intended to refer back to section 362(a) as a means to distinguish between categories, and is either mere surplusage within a poorly drafted statute, or designed to distinguish between joint filers where one spouse is a serial filer.[30] Further, the minority argues that their interpretation does not create unnecessary surplusage but rather gives greater meaning to the rest of 362(c)(3), which deals with extension of the stay beyond thirty days, because parties are more likely to move for an extension under the minority view.[31]

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[28] 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).

[29] *See, e.g.*, Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985); In re Smith, 910 F.3d 576, 578 (1st Cir. 2018); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute.").

[30] *See Smith*, 910 F.3d at 583-84 (holding that it is unclear whether § 362 (c)(3)(A) and § 362(a) should be read together because there is no mirroring language, and even if they were "with respect to the debtor" is superfluous or in reference to joint filing cases); In re Daniel, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009) (holding that "with respect to the debtor" distinguishes between a serial filing spouse, and a first-time filing spouse); 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, 430-31 (2012) (finding that all ten stand-alone instances in which the phrase "with respect to the debtor" was used in the bankruptcy code could be construed as filler).

[31] *See* 11 U.S.C. § 362 (c)(3)(B); *see also, e.g.*, In re Reswick, 446 B.R. 362, 368-69 (B.A.P. 9th Cir. 2011) (reasoning that the majority's interpretation "makes section 362(c)(3)(A) difficult to reconcile with section 362(c)(3)(B)").

After review of the legislative history, the minority view determines that Congress intended section 362(c)(3)(A) as a means to correct abuses of the Bankruptcy Code and deter repeat filings.[32] Total termination of the stay best accomplishes these policy goals because debtors are deprived of the automatic stay after 30 days if they file repeatedly.[33] Moreover this disincentive to refile is an appropriate middle ground between first time filing, where the stay is in full effect, and filing after having two or more cases dismissed in a year, where the stay never goes into effect.[34] The minority thus reads 362(c)(3)(A) to create a strong deterrent to repeat filing in opposition to the majority's relatively weak deterrent that would only apply in limited circumstances.[35]

V. Chapter 7 Implications

While courts have thoroughly analyzed the issue in the context of a Chapter 13 bankruptcy, most, especially those taking the minority view, have not fully considered the Chapter 7 implications. This is no trivial omission either. Chapter 7 bankruptcies accounted for 62% of all filings in 2019 and section 362(c)(3) expressly applies to cases "under chapter 7, 11,

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[32] *See* Milavetz, Gallop, & Milavetz, P.A. v. United States, 559 U.S. 229, 231-232 (2010) ("Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act to correct perceived abuses of the bankruptcy system."); H.R. Rep. No. 109-31(I), at 2 (2005); S. Rep. No. 105-253, at 39.

[33] *See, e.g.*, In re Smith, 910 F.3d 576, 590 (1st Cir. 2018) (holding that the minority interpretation is the best deterrent to bankruptcy abuse and repeat filing).

[34] *See id.* at 586.

[35] *See id.* at 590.

or 13."[36] Though many cases relevant to this issue arose in a Chapter 13 context, there have been a number of chapter 7 cases that help show why consideration of all chapters is important.[37]

In a chapter 7 context, the minority view fails to take into account the interests of the trustee.[38] In chapters 11 and 13 there are debtor-in-possession provisions, but there is no equivalent in chapter 7.[39] Therefore, it is the trustee, not the debtor, who manages the property of the estate and must deal with potential termination of the automatic stay with respect to it.[40] In fact, the trustee has an enumerated duty "to collect and reduce to money the property of the estate."[41] The automatic stay is crucially important to carrying out this duty because without it creditors could enforce their own collection actions, leaving the trustee with little left to collect.[42]

Likewise, the trustee would be hard pressed to meet the requirements and deadlines imposed by section 362(c)(3)(B) that governs extension of the stay beyond 30 days.[43] Thirty days is an impossibly short time frame because the trustee knows next to nothing about the case

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[36] 11 U.S.C. § 362(c)(3)(A) (2012); In re Williams, 346 B.R. 362, 369 (Bankr. E.D. Pa. 2006) ("Subsection (c) applies in all bankruptcy cases, including chapter 7 cases."); UNITED STATES COURTS, BAPCPA REPORT- 2019, (July 27, 2020), https://www.uscourts.gov/statistics-reports/bapcpa-report-2019.

[37] *See* In re Thu Thi Dao, 616 B.R. 103 (Bankr. E.D. Cal. 2020) (Chapter 7); In re Rinard, 451 B.R. 12 (Bankr. C.D. Cal. 2011) (Chapter 7); In re Daniel, 404 B.R. 318 (Bankr. N.D. Ill. 2009) (Chapter 13 converted to chapter 7).

[38] *See Thu Thi Dao*, 616 B.R. at 106.

[39] *See id*. at 106.

[40] *See id.*

[41] 11 U.S.C § 704(a)(1) (2012).

[42] *See Thu Thi Dao*, 616 B.R. at 111 ("A crucial tool in the chapter 7 trustee's toolbox is the automatic stay.").

[43] *See* 11 U.S.C. § 362(c)(3)(B)-(C); *id.*

and its assets so soon after filing.[44] The meeting of creditors generally does occur within the 30-day deadline for extension.[45] Additionally, the debtor often does not file schedules that give the trustee insight into the case until after 30 days because the filing deadline is often extended.[46] Therefore, in the first thirty days of a case the trustee has very little information about the case needed to succeed on a motion to extend the automatic stay.

Additionally, the trustee would likely be unable to satisfy the clear and convincing burden of proof required to extend the stay.[47] First, section 362(c)(3) includes a good faith requirement, but there is no such requirement to file a chapter 7 case.[48] The minority view thus would require the trustee, who holds little information about the case, to satisfy by clear and convincing proof a requirement the debtor did not have at the time of filing. This is not the only inconsistency that arises either. To extend the stay beyond thirty days, the trustee would need to prove by clear and convincing evidence that the case will conclude with a discharge, yet the trustee also has a duty to oppose the discharge in some instances.[49] All these incongruities make even less sense when one looks at section 362(h), which only requires the trustee to persuade the court within a more flexible timeframe that the stay should not terminate.[50] Congress likely

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[44] *See Thu Thi Dao,* 616 B.R. at 112.

[45] *See* 11 U.S.C. § 341 (2012).

[46] 11 U.S.C. § 521(a); Fed. R. Bankr. P. 1007(a)(1).

[47] *See* § 362(c)(3)(C); *Thu Thi Dao,* 616 B.R. at 113 (the § 362(c)(3)(C) burden of proof for requests to preserve the stay is impossible for a chapter 7 trustee to satisfy).

[48] § 362(c)(3)(C); Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 374-75 & n.11 (2007).

[49] § 362(c)(3)(C); 11 U.S.C. § 704(a)(6) (2012); *Thu Thi Dao,* 616 B.R. at 113.

[50] 11 U.S.C. § 362(h) (2012); *Thu Thi Dao,* 616 B.R. at 114-15.

would not have made extension of the stay reasonable in one section but impossible in another. Therefore, the majority interpretation is the only one that makes sense in the chapter 7 context.[51]

VI. Conclusion

The current battle of interpretive canons engaged in by the majority and minority is useful, but consideration of the chapter 7 implications is necessary to a comprehensive interpretation. While the absence of a Supreme Court ruling leaves a circuit split and a divide among lower courts intact, further percolation may help round out the arguments forwarded by both sides.

[51] *See Thu Thi Dao,* 616 B.R. at 116-17; In re Williams, 346 B.R. 362, 369 (Bankr. E.D. Pa. 2006) ("By continuing to protect estate property in section 362(c)(3), Congress was allowing chapter 7 trustees the normal opportunity to determine…whether there is non-exempt equity in property of the estate that could be liquidated for the benefit of creditors.").