NOTES

Should It Stay or Should It Go: The Clash of Canons over Termination of the Automatic Stay for Repeat Filers

One of the most important debtor protections provided by bankruptcy law is the automatic stay, which stops creditors from pursuing collection actions against the debtor. Over time, however, debtors began to abuse the stay by repeatedly filing for bankruptcy each time a creditor tried to foreclose upon them. In response, Congress amended the Bankruptcy Code and added § 362(c)(3)(A), which terminated the stay after 30 days for debtors who had one prior bankruptcy case dismissed within a year of filing. Although the intent of the section is clear, courts have struggled to interpret how it should operate and two main approaches have emerged. The majority approach holds that under § 362(c)(3)(A) the automatic stay terminates only with respect to some creditor actions, which provides a relatively weak deterrent to abusive debtors, while the minority approach calls for total termination of the stay despite the adverse effects on creditors and the chapter 7 trustee. Because both current approaches are unsatisfactory, this Note proposes a novel solution that calls for a legislative redrafting of § 362(c)(3)(A) to clarify ambiguous language and terminate the automatic stay except with respect to property of the estate, but create a presumption in favor of relief from the stay that is rebuttable by a party in interest. This solution would best accommodate all parties involved in a bankruptcy case while also accomplishing Congress's goal of deterring repeat-filing debtors.

INTRODUCTION

In any bankruptcy case, the automatic stay puts a freeze on all collection actions and has long been considered a cornerstone of the bankruptcy system.[1] Because the automatic stay is so effective at keeping creditors at bay, however, it attracted a horde of bad-faith debtors—repeat and serial filers—intent on abusing the stay to thwart collection efforts.[2] This problem became so prevalent that Congress

1. *See* S. REP. NO. 95-989, at 54 (1978) (describing the automatic stay as "fundamental" in accomplishing the goals of the bankruptcy system).

2. *See* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 277–79 (1997) (reporting that abuse of the automatic stay occurred frequently and needed to be dealt with).

decided to introduce reforms to the bankruptcy system to correct the issue.[3] The reform found in § 362(c)(3)(A) of the Bankruptcy Code, however, dramatically altered the traditional bankruptcy system by terminating the automatic stay with respect to serial-filing debtors.[4]

Interpretation of this section has led to considerable controversy. Two circuits, as well as over seventy lower courts, are split on whether the automatic stay terminates entirely for repeat filers or only terminates with respect to some types of actions.[5] The disagreement that has raged on in courts for the past sixteen years concerns the interpretation of a mere five words within the Bankruptcy Code: "with respect to the debtor."[6] The First Circuit was the first to consider the issue and held that Congress intended for the automatic stay to terminate entirely for repeat filers, such that creditors could go after any property.[7] The First Circuit's decision is supported by a number of lower courts but has become the minority view.[8] In contrast, the Fifth Circuit created a circuit split in 2019 when it read "with respect to the debtor" to mean that the automatic stay terminated with respect to only *some* actions, namely actions against the debtor and property of the debtor, but not actions against property of the estate.[9] This position has become the majority view, with many lower courts having taken the same approach.[10]

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3. *See* S. 256, 109th Cong. (2005) (containing sweeping reforms to the bankruptcy system commonly referred to as the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")).

4. *See* 11 U.S.C. § 362(c)(3) (terminating the automatic stay after thirty days with respect to debtors who have had a case dismissed within the past year).

5. *See, e.g.*, Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 230 (5th Cir. 2019) (adopting the majority view); Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 591 (1st Cir. 2018) (adopting the minority view).

6. *See* 11 U.S.C. § 362(c)(3)(A) (containing "with respect to the debtor").

7. *In re Smith*, 910 F.3d at 578.

8. *See, e.g.*, *id.* at 591; Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 367–68 (B.A.P. 9th Cir. 2011); *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).

9. *Rose*, 945 F.3d at 230.

10. *See, e.g.*, *id.* at 230; Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); *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 Invs., 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 Tr. Co. of Cal. 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). Although only two circuits have ruled on the issue, the so-called majority approach gets its name from the widespread support it has garnered among lower courts. Likewise, the so-called minority approach gets its name from the minority support it has received in the lower courts. To remain consistent with how courts reference these approaches, this Note will correspondingly refer to the two main approaches as the majority and minority approaches.

The Supreme Court of the United States denied certiorari in June 2020 on a case that would have resolved the split, choosing instead to let the issue percolate further in the lower courts.[11] This percolation will likely occur if current bankruptcy trends continue. Chapter 11 bankruptcies increased forty percent from 2019 to 2020.[12] Moreover, while things like mandatory-foreclosure forbearances have obviated the need to file for bankruptcy and have lowered the current filing rate, experts predict that a wave of individual bankruptcy filings are imminent in the coming years.[13] Consequently, this wave will inevitably result in some repeat filers that the court must address. Accordingly, the circuit split will likely deepen, leaving the automatic stay availability for repeat filers dependent upon where a debtor chooses to file. Both the minority and majority approaches have undesirable policy implications concerning congressional intent, the creditors, the chapter 7 trustee, or some combination of the three that not even a Supreme Court ruling would resolve.[14] Therefore, a new approach is needed to more fairly terminate the automatic stay with respect to repeat filers.

This Note proposes that § 362(c)(3)(A) be redrafted to adopt a modified majority approach. This approach would work by terminating the stay only with respect to actions against the debtor and property of the debtor, not with respect to property of the estate, while also creating a rebuttable presumption in favor of motions for relief from the stay. As

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11. Rose v. Select Portfolio Servicing, Inc., 141 S. Ct. 158 (2020) (denying cert).

12. Alex Wolf, *Corporate Bankruptcy Wave Turns to Dust, Defying Expectations*, BLOOMBERG L. (Jan. 5, 2022, 5:00 AM), https://news.bloomberglaw.com/bankruptcy-law/corporate-bankruptcy-wave-turns-to-dust-defying-expectations (explaining that the wave of bankruptcies predicted in 2021 did not materialize, but that this may be a short term forbearance); *U.S. Bankruptcies Drop to 14-Year Low as Coronavirus Cases Surge*, REUTERS (Dec. 3, 2020, 6:14 PM), https://www.reuters.com/article/usa-economy-bankruptcy/u-s-bankruptcies-drop-to-14-year-low-as-coronavirus-cases-surge-idUSL1N2IJ32E [https://perma.cc/H923-WEAH].

13. Mark E. Hall & Michael R. Herz, *What's Disrupting Bankruptcy Trends Predicted in the Pandemic?*, BLOOMBERG L. (Oct. 30, 2020, 3:01 AM), https://news.bloomberglaw.com/bankruptcy-law/whats-disrupting-bankruptcy-trends-predicted-in-the-pandemic [https://perma.cc/5KW8-9X8S]; Teadra Pugh, *Analysis: Consumer Bankruptcy Filings Are Low. Too Low.*, BLOOMBERG L. (Aug. 31, 2020, 2:31 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-consumer-bankruptcy-filings-are-low-too-low [https://perma.cc/38VD-96WE] (providing data on consumer bankruptcy filing trends showing, and fearing, that a wave of bankruptcies could be coming soon); Mary Williams Walsh, *A Tidal Wave of Bankruptcies Is Coming*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/18/business/corporate-bankruptcy-coronavirus.html [https://perma.cc/HJ9P-X3NM].

14. *See infra* Part II (laying out the majority and minority approaches and the policy implications of both). In general, the majority approach is best for creditors and the chapter 7 trustee but does very little to deter abuse of the bankruptcy system. On the other hand, the minority approach creates a strong deterrent to repeat filing but has unsavory collateral effects on the creditors and chapter 7 trustee.

a result, the modified majority approach would protect creditors and the trustee by maintaining the automatic stay with respect to property of the estate, and it would also deter serial-filing debtors through the presumption in favor of relief from the stay for the creditor. Accordingly, this approach would address the issue of serial-filing debtors better than any current approach.

Part I of this Note provides background on the mechanics of the bankruptcy system, including the automatic stay, as well as the problems that led to the system's reform. Part II then analyzes the disagreement that the courts have had over the meaning of § 362(c)(3)(A), which terminates the automatic stay for repeat filers. Part III proposes a novel solution and legislative drafting, combining elements of the current approaches to address their failures, including the effects on chapter 7 trustees and the creditors' interests. A brief conclusion follows.

I. BACKGROUND

To fully understand the importance and implications of the § 362(c)(3)(A) issue, a general understanding of how the bankruptcy process works is necessary. Appropriately, this Part will start by addressing one of the earliest, and most important, choices facing any debtor: under which chapter of the Bankruptcy Code to file. Primarily, the focus is on chapters 7, 11, and 13 because they are the most common for debtors and are the only chapters to which § 362(c)(3)(A) applies.[15] Immediately upon filing, two important concepts arise: (1) property of the estate and (2) the automatic stay.[16] This Part will consequently explain the different types of property within a bankruptcy case and then turn to the automatic stay and its protection of property. Although the automatic stay has been widely regarded as beneficial, it has also long been subject to abuse, which this Part will detail.[17] Finally, this Part will turn to Congress's amendments of the Bankruptcy Code, chiefly § 362(c)(3)(A), designed to remedy such abuse, which will set the

15. *See* 11 U.S.C. § 362(c)(3)(A) (applying to cases "under chapter 7, 11, or 13" of the Bankruptcy Code). Statistics also show that these three chapters are by far the most commonly used in bankruptcy. *See* UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2020, at 1 (2020), https://www.uscourts.gov/sites/default/files/bf_f2_1231.2020.pdf [https://perma.cc/9VRQ-Y49R].

16. *See* 11 U.S.C. § 362(a) ("A petition filed . . . operates as a stay . . . ."); *id.* § 541(a)) ("The commencement of a case . . . creates an estate.").

17. *See* NAT'L BANKR. REV. COMM'N, *supra* note 2.

stage for the ongoing and worsening controversy in bankruptcy law over termination of the automatic stay for repeat filers.[18]

A. Filing for Bankruptcy: Choosing Between Different Chapters

Much like filing a complaint to commence a civil lawsuit, a bankruptcy case begins with the filing of a petition under one of the chapters of the Bankruptcy Code.[19] Although there are six chapters in total, only three are relevant for most debtors: chapters 7, 11, and 13. In 2020, filings under these three chapters accounted for over ninety-nine percent of the 544,463 cases commenced during that year.[20] Choosing between these three chapters, however, can often be difficult because each chapter varies to some degree in its eligibility requirements, treatment of assets, and procedural mechanisms.[21] Accordingly, an explanation of the differences between chapters 7, 11, and 13 will lay out the foundation for understanding the workings of the bankruptcy system.

Chapter 7 bankruptcies are often referred to as "liquidations" because the debtor's assets are typically liquidated, or sold, to satisfy debts.[22] Chapter 7 relief is available to many different kinds of debtors—including individuals, partnerships, and corporations[23]—but

18. 11 U.S.C. § 362(c)(3); *see* Millavetz, Gallop & Millavetz, P.A. v. United States, 559 U.S. 229, 231–32 (2010) ("Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system.").

19. *See* MARGARET HOWARD & LOIS R. LUPICA, BANKRUPTCY: CASES AND MATERIALS 38, 45 (6th ed. 2016) (discussing the commencement of either a voluntary or involuntary case but explaining that both begin with filing a petition).

20. According to the data from the United States Courts website, there were a total of 544,463 business and nonbusiness cases commenced in 2020. Of that total, 378,953 were filed under chapter 7, 156,377 were filed under chapter 13, and 8,333 were filed under chapter 11. The total filed under all other chapters of the Bankruptcy Code was only 800. UNITED STATES COURTS, *supra* note 15. There are three other chapters of the Bankruptcy Code that this Note will not discuss because they are not relevant to the narrow issue addressed. *See infra* Part I.D (explaining that § 362(c)(3)(A), on which this note focuses, only applies to chapters 7, 11, and 13). To provide some background, however, the other options are chapter 9 (bankruptcy for municipalities), chapter 12 (bankruptcy for family farmers and fishermen), and chapter 15 (bankruptcy for international cases). Steve Nitz, *The Different Chapters of Bankruptcy Explained*, NAT'L FOUND. FOR CREDIT COUNSELING (Sept. 22, 2017), https://www.nfcc.org/resources/blog/different-chapters-bankruptcy-explained/ [https://perma.cc/284W-M4D3].

21. *Compare* 11 U.S.C. § 109(b) (laying out eligibility requirements for chapter 7 bankruptcies), *with id.* § 109(d) (laying out the eligibility requirements for chapter 11 bankruptcies), *and id.* § 109(e) (laying out the eligibility requirements for chapter 13 bankruptcies). This Section will discuss the full scope of these differences as relevant to this Note.

22. *See* WILLIAM HOUSTON BROWN, CONSUMER BANKRUPTCY LAW: CHAPTERS 7 & 13, at 89 (2014) (discussing relief under chapter 7).

23. *See* 11 U.S.C. § 109(b) (defining who is eligible for chapter 7 relief). § 109(b) says that any "person" may be a debtor under chapter 7 unless they are a railroad, insurance company, or bank.

is most common for individual debtors with little to no income who cannot afford to pay back their debts through regular installments.[24] In fact, to even proceed with a chapter 7 case, an individual must make below a certain level of disposable income.[25] The debtor under chapter 7, however, does not manage their assets.[26] Instead, a chapter 7 trustee is appointed by the United States Trustee and has a duty to liquidate and distribute the debtor's assets.[27] The trustee thus essentially takes over administration of the case and is one of the most important aspects of a chapter 7 bankruptcy.[28] Once the trustee has liquidated all assets and distributed the proceeds to creditors, the debtor's debts are released, or discharged, such that the debtor essentially no longer has the obligation to pay them.[29] This process generally takes about four months and leads to a discharge ninety-nine percent of the time.[30] In the end, the debtor is released from all debts, but he is also stripped of most of his valuable assets.[31]

"Person" is defined in the Bankruptcy Code very broadly to include most everyone except governmental units. *See id.* § 101(41) (defining person).

24. *See* BROWN, *supra* note 22, at 90 (discussing eligibility requirements under chapter 7). Income level is the key in determining whether or not a debtor can file for chapter 7 bankruptcy. *See id.* Generally, if a debtor's income is high enough, they should be forced to file under chapter 11 or 13 because the creditors usually get paid more under such a repayment plan. *See id.* If the debtor has very little income, however, liquidation may be the only way for creditors to receive any payment, which makes chapter 7 relief appropriate. *See id.*

25. *See* 11 U.S.C. § 707 (laying out the eligibility requirements for chapter 7 debtors). Part of the eligibility requirements is the "means test," which was designed to make sure that debtors were not abusing chapter 7 by using it to avoid having to pay debts despite their ability to do so. *Id.* The means test is a complicated calculation, but it essentially projects a debtor's disposable income out over five years to get at how much the debtor would be able to pay under a chapter 13 plan. *See id.* If that total amount is less than 25 percent of the total debts, there is no presumption of abuse. *Id.* If it is more, however, then the case will be dismissed or converted to chapter 13. *Id.*

26. *See id.* §§ 701–04 (discussing the trustee and his unique role in a chapter 7 bankruptcy, including his duty to collect and liquidate assets, then distribute the proceeds to creditors).

27. *See id.* § 701 (setting forth appointment of the trustee).

28. *See id.* § 704 (setting forth the trustee's duties, which include collection and distribution of assets of the estate); Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147 app. at 216 (2006) ("[A] [t]rustee occupies a significant position of trust and responsibility and is accountable to all in the bankruptcy system and the public at large.").

29. *See* 11 U.S.C. §§ 524(a), 554 (detailing how discharge works in a chapter 7 case). There are certain debts, however, that are non-dischargeable. *See id.* § 523 (listing a number of debts that are not dischargeable). This means that even if the debtor completes the bankruptcy process and obtains a discharge, some debts may not be included. For example, domestic support obligations such as alimony are not dischargeable and will still need to be paid even if the debtor obtains a discharge. *Id.* § 523(a)(5). Distinguishing between dischargeable and non-dischargeable debts, however, is beyond the scope of this Note.

30. *Chapter 7 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Nov. 12, 2021) [https://perma.cc/M75D-XKGU].

31. *See id.* (detailing how a chapter 7 bankruptcy works and where it leaves a debtor).

Chapter 13, in contrast to chapter 7, is often called a "wage earner's plan,"[32] where the debtor uses his regular income to pay back debts in installments according to a plan agreed upon by the debtor and creditors.[33] Thus, to be eligible for chapter 13, a debtor must have a regular income and debts within prescribed limits.[34] Although there are trustees in chapter 13, they are not nearly as involved as they are in chapter 7 because chapter 13 debtors can remain in possession of their assets.[35] Accordingly, the trustee largely only has the duty to collect payments from the debtor and distribute them.[36] The chapter 13 process usually lasts somewhere between three and five years, depending on the plan, and is designed to give the debtor enough time to pay back debts gradually.[37] If the debtor is able to make the payments, then he will receive a discharge and come out of bankruptcy still in possession of important assets, like a house or car.[38]

Chapter 11 bankruptcies are frequently called "reorganizations" and are typically used to restructure a business.[39] Chapter 11 and chapter 13 are very similar, except chapter 11 does not have debt limits, so wealthy individuals and most businesses must file under it.[40] In a chapter 11 case, the debtor works with creditors to reorganize his debts and to create a plan whereby he repays creditors through installments.[41] Like in chapter 13, the chapter 11 trustee assumes more of a supervisory role because the debtor can remain in possession of

32. *Chapter 13 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Nov. 12, 2021) [https://perma.cc/EV99-PZB7] (discussing chapter 13 bankruptcies generally and when they are appropriate).

33. *See* BROWN, *supra* note 22, at 115 (discussing relief under chapter 13); U.S. CTS., *supra* note 30.

34. 11 U.S.C. § 109(e). The debt limits in a chapter 13 case are $419,275 for noncontingent, liquidated, unsecured debts, and $1,257,850 for noncontingent, liquidated, secured debts. *Id.* These limits are fairly large, but if a debtor's debts exceed them, then the debtor will be forced to either file for a chapter 7, or more likely, reorganize through a chapter 11 bankruptcy.

35. *See id.* §§ 1301–02 (laying out the powers and duties of the chapter 13 trustee, which largely amount to disbursement of plan payments).

36. U.S. CTS., *supra* note 32 (explaining the duties of the trustee in a chapter 13 case).

37. *See* 11 U.S.C. § 1322 (setting forth the plan requirements as well as some optional provisions).

38. *See id.* § 1328 (laying out how discharge in a chapter 13 case works). Remember that not all debts are dischargeable, but most are. *See supra* note 29 and accompanying text.

39. *Chapter 11 - Bankruptcy Basics,* U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Nov. 12, 2021) [https://perma.cc/3Y2N-GP7H].

40. *See* 11 U.S.C. § 109(d) (laying out the eligibility requirements of chapter 11, which do not include any debt limitations).

41. *See id.* §§ 1121–29 (describing the contents and requirements of a chapter 11 plan).

assets.[42] Once more if the debtor is able to make these payments and otherwise abide by the plan, then his debts will be discharged and the debtor can emerge from bankruptcy and continue business.[43] For example, consider the Chicago Cubs organization, which filed for bankruptcy under chapter 11 in 2009 and then won the World Series just seven years later.[44]

B. What Happens Next: The Automatic Stay and Its Protection of Property

After a debtor files under any chapter, two important and related processes immediately are triggered: (1) assets are reapportioned between a bankruptcy estate and the debtor, and (2) the automatic stay goes into effect.[45] When assets are reapportioned, they become either property of the estate or property of the debtor.[46] Concurrently, the automatic stay, which pauses creditor collection actions, goes into effect and protects both categories of property (and more) from creditors.[47] This Section will first explain the key differences between property of the estate and property of the debtor and then describe the automatic stay and how it protects the debtor and property in a bankruptcy case.

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42. *See* U.S. CTS., *supra* note 39 (describing the chapter 11 process generally and the trustee's role in it).

43. *See* 11 U.S.C. § 1141 (describing how discharge works in a chapter 11 bankruptcy). Again, not all debts are dischargeable but, for the most part, the debtor will be free from obligation to pay back debts. *See supra* note 29 and accompanying text.

44. *See* Ameet Sachdev, *Cubs Bankruptcy in a League of Its Own*, CHI. TRIB. (Oct. 13, 2009), https://www.chicagotribune.com/news/ct-xpm-2009-10-13-0910120439-story.html [https://perma.cc/R3VC-5K8T] (discussing why the Cubs decided to file for bankruptcy).

45. *See* 11 U.S.C. § 362(a) ("A petition filed . . . operates as a stay . . . ."); *id.* § 541(a) ("The commencement of a case . . . creates an estate.").

46. *See id.* § 541 (describing which property becomes property of the estate); *id.* § 522 (laying out exemptions that would turn property of the estate into property of the debtor); *id.* § 554 (describing the process of abandonment, whereby assets with little value leave the estate and become property of the debtor); *see also* Jonelle Marte, *What Happens to Your House When You File for Bankruptcy*, WASH. POST (July 26, 2016), https://www.washingtonpost.com/news/get-there/wp/2016/07/26/what-happens-to-your-property-when-you-file-for-bankruptcy/ [https://perma.cc/2KYS-LRZ9] (describing how property generally gets treated in bankruptcy and providing helpful examples).

47. 11 U.S.C. § 362(a); *Bankruptcy Basics Glossary*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary (last visited Feb. 17, 2022) [https://perma.cc/C5QB-F98F] (defining the automatic stay as "[a]n injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed").

1. Property of the Estate Versus Property of the Debtor

Property of the estate is one of the most important concepts in bankruptcy because when a case commences, the estate is immediately created, and essentially everything the debtor owns becomes part of it.[48] Most notably, property of the estate includes "all legal or equitable interests of the debtor."[49] Legal interests are everything that the debtor owns outright, such as a laptop purchased free and clear.[50] Equitable interests, on the other hand, are things in which the debtor only owns a right in the property, such as a beneficiary interest in a trust.[51] Property of the estate, however, is not limited to this already broad characterization.[52] It also includes interests of the debtor and his spouse in community property;[53] certain interests in property that the trustee recovers,[54] interests in property preserved for the benefit of the estate;[55] property or interest that the debtor becomes entitled to within 180 days after filing;[56] proceeds, rents, profits, and the like from property of the estate;[57] and interests in property that the estate acquires after commencement of the case.[58] This means that, for

48. *See* 11. U.S.C. § 541 (defining the extent of the bankruptcy estate); 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."); 5 COLLIER ON BANKRUPTCY ¶ 541.01 (16th ed. 2021) ("In order to achieve [the] goals [of bankruptcy], it is necessary and desirable that the property included in the bankruptcy estate be as inclusive as possible."). The only property that does not immediately become part of the estate is described in § 541(b)-(d). These sections, however, often describe only a fractional amount of property relative to the value of all the assets in the estate. These exceptions to the estate, therefore, are beyond the scope of this Note. *See* Blanche D. Smith & W. Steve Smith, *Property of the Estate–To Be or Not to Be? That Is the Question the Trustee Asks of Thee Part I*, 21 AM. BANKR. INST. 28, 28 (Dec. 1, 2002) (explaining that although the definition of property of the estate seems clear, there is often ambiguity as to what is included within the estate).

49. 11 U.S.C. § 541(a) (defining property of the estate). Legal and equitable interests are perhaps the broadest category of property of the estate, but is not the only category. Section 541(a) lists six other categories of property of the estate. *Id.* § 541(a)(2)-(7). The distinctions between these different categories, however, is not critical to understanding the basic point that almost everything immediately becomes property of the estate.

50. *See* RESTATEMENT (FIRST) OF PROP. § 6(2) cmt. b (AM. L. INST. 1936) (defining legal interests).

51. *See id.* (defining equitable interests and distinguishing them from legal interests).

52. *See* 11 U.S.C. § 541(a)(2)-(7) (laying out the numerous other types of property that are included in property of the estate).

53. *Id.* § 541(a)(2).

54. *Id.* § 541(a)(3). For example, this subsection allows the trustee to void fraudulent transfers—transfers by the debtor prior to bankruptcy in an attempt to shield assets—and bring them back into the estate. *See* 11 U.S.C. § 550.

55. *Id.* § 541(a)(4).

56. *Id.* § 541(a)(5). As this section explains, this often includes things like inheritances. *Id.*

57. *Id.* § 541(a)(6).

58. *Id.* § 541(a)(7).

example, cows born from a debtor's livestock after filing would immediately become property of the estate.[59] The definition of property of the estate, therefore, leaves very little room for any other type of property and evidences a policy of "broad inclusiveness."[60]

Consequently, property of the debtor is a relatively small amount of property, comprised only of those assets subject to an exemption from the estate or whose value is so inconsequential that the trustee abandons it.[61] While exemptions are numerous, they are only for specific types of property and also are generally subject to a limit in value.[62] For example, under § 522(d)(2), the debtor is entitled to an exemption for a motor vehicle but only up to $4,000 in value.[63] If the motor vehicle exceeds $4,000, then any value in excess of that is property of the estate. Similarly, the debtor may be entitled to an exemption for a wedding ring under § 522(d)(4) but the exemption is limited to $1,700 in value. Because assets only become property of the debtor through limited exemptions or abandonment due to low value, property of the debtor is inherently small compared to the broadly defined property of the estate.[64] Accordingly, one useful way to conceptualize the difference between these categories is that property of the estate is the rule and property of the debtor is the exception.[65] Therefore, while property of the debtor may be important only to the debtor, property of the estate is the key concern in the grand scheme of a bankruptcy case.

2. The Automatic Stay: A Shield Against Creditors

Just as immediately as an estate is created, the bankruptcy system imposes one of the debtor's most valuable protections: the

59. *See id.* § 541(a)(6) (explaining that proceeds, profits, product, offspring, rent, or profits from property of the estate become property of the estate). In this case, the newborn cow would be "offspring" of livestock, which are property of the estate.

60. HOWARD & LUPICA, *supra* note 19, at 99.

61. 11 U.S.C. § 522 (listing exemptions from property of the estate); *id.* §554 (describing the process of abandonment whereby a trustee can abandon property of the estate, turning it into property of the debtor, for certain items of inconsequential value).

62. *See id.* § 522. The limits on value, however, are regularly adjusted for inflation and therefore generally increase with time.

63. *See id.* § 522(d)(2).

64. *See id.* § 522(d); § 554(a).

65. *See, e.g.*, Richard Slottee, *Understanding Bankruptcy*, OR. ST. BAR (Sept. 2020), https://www.osbar.org/public/legalinfo/1016_UnderstandingBankruptcy.htm [https://perma.cc/SU45-J52P] (showing that when one files for bankruptcy, nearly all of their property becomes property of the estate unless it is needed for the debtor's survival).

automatic stay.[66] The automatic stay is a critical component of any bankruptcy case because it acts like a shield, or an injunction, and halts almost all creditor actions against the debtor.[67] In the normal course of a bankruptcy, its operation is relatively straightforward.[68] As soon as a bankruptcy case commences, the automatic stay goes into effect without any need for court action.[69] Once this occurs, creditors cannot continue pursuing their collection efforts.[70] In other words, the automatic stay is exactly what it sounds like: a device that *stays* all creditor actions *automatically* upon bankruptcy filing by the debtor.

The automatic stay applies to three broad categories: actions against (1) the debtor, (2) property of the debtor, and (3) property of the estate.[71] The first category includes actions like an *in personam* suit against the debtor, and the latter two categories are actions to seize the different types of property described above.[72] Thus, for example, suppose an individual is behind on mortgage payments to First Bank, is behind on credit card payments to Visa for a wedding ring purchase, and has a tort suit pending against him for a car accident. If this individual files for bankruptcy, the tort suit becomes an *in personam* action against the debtor, the wedding ring is exempted from the estate and becomes property of the debtor,[73] and the mortgaged house becomes property of the estate.[74] The automatic stay would then pause any

66. 11 U.S.C. § 362(a); U.S. CTS., *supra* note 47 (defining the automatic stay as "[a]n injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed").

67. *See* 11 U.S.C. § 362(a) (defining the automatic stay and the actions that it stops).

68. *See id.* (laying out the basic function of the automatic stay for debtors who are not serial filers). If an individual is a repeat filer, then the automatic stay operates differently, as will be discussed later in this Note. *See infra* Part I.D (describing the amendments that alter the operation of the automatic stay for repeat filers). In general, however, a repeat filing debtor is not afforded the full protection of the automatic stay because the debtor is presumed to be abusing the bankruptcy system. *See* 11 U.S.C. §§ 362(c)(3)-(4) (altering the operation of the automatic stay for repeat filers).

69. 11 U.S.C. § 362(a).

70. *Id.*

71. *See id.* (detailing to what the automatic stay is applicable); Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 230 (5th Cir. 2019).

72. *See supra* Part I.B.1 (distinguishing between property of the estate and property of the debtor). *In personam* translates to "against a person" and refers to a judgment that is enforceable against an individual person as opposed to against property. *In Personam*, BLACK'S LAW DICTIONARY (11th ed. 2019).

73. *See* 11 U.S.C. § 522(d)(4) (listing an exemption for jewelry, but note that if the wedding ring value exceeds the limit, the excess value remains in the estate).

74. *See id.* § 541(a), (d) (including such property within the definition of property of the estate).

action by the tort plaintiff to collect on a judgment,[75] by Visa to recover the wedding ring,[76] and by First Bank to foreclose on the house.[77] This example demonstrates why the automatic stay's protection of property of the estate is more important than its protection of property of the debtor because property of the estate (i.e., the house) is more economically valuable than the property of the debtor (i.e., the wedding ring).[78]

3. Benefits of the Automatic Stay

The debtor undoubtedly benefits from imposition of the automatic stay.[79] Indeed, legislative history indicates that benefiting debtors was a major purpose behind its creation:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[80]

In furtherance of this purpose, the Bankruptcy Code also imposes monetary damages on creditors for violations of the automatic stay.[81] Consider, for example, a debtor who has lost his job, missed a few mortgage payments, and faces imminent foreclosure as a result. Normally, the debtor would lose his house and be forced to concentrate on finding shelter instead of a new job to make up for his missed payments. The automatic stay, however, prevents and deters creditors, through the threat of damages, from bringing any foreclosure action and allows the debtor to retain his house as he finds his financial footing.[82] Thus, taken together, these various provisions of the Bankruptcy Code provide the debtor with a powerful tool to keep creditors at bay.

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75. *See id.* § 362(a)(1) (staying "commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor").

76. *See id.* § 362(a)(5) (restricting ability to collect from property of the debtor).

77. *See id.* § 362(a)(3) (prohibiting "any act to obtain possession of property of the estate").

78. The stay's protection afforded to actions against the debtor could be significant if there is a large judgment, but either property of the debtor or property of the estate would be needed to satisfy the judgment. Since the estate is relatively large, it would likely be the only way to satisfy such a judgment. Therefore, property of the estate once more proves critical.

79. *See* H.R. REP. NO. 95-595, at 340 (1977) (explaining that the stay is intended to help debtors).

80. *Id.*

81. 11 U.S.C. § 362(k).

82. *See id.* (imposing damages that deter violations of the stay); *id.* § 362(a)(3) (preventing acts to obtain control over property of the estate).

Creditors, however, also benefit from the automatic stay.[83] While it may sound counterintuitive that a provision designed to halt creditor actions actually helps creditors, in the bigger picture, creditors prefer the automatic stay because it prevents a race to the courthouse and keeps assets intact.[84] For example, imagine that a debtor has only $50,000 worth of assets but owes Lender One $50,000 in principal and interest payments and owes Lender Two $50,000. If Lender One is the first to sue and obtain a judgment, then all the debtor's assets will be used to satisfy the judgment, and Lender Two will be left with nothing. With the automatic stay in place, however, the debtor's assets will be collected and fairly distributed such that both Lenders get some compensation, perhaps $25,000 each.[85] Legislative history indicates that Congress intended for the automatic stay to operate in this manner:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.[86]

Moreover, even in instances where the automatic stay would be detrimental, creditors can find ways around it.[87] First, there are a number of exceptions to the automatic stay that prevent it from applying, although many of these do not come into play in consumer cases.[88] Further, creditors can move for relief from the stay in certain,

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83. *See* H.R. REP. NO. 95-595, at 340 (explaining that the automatic stay is also intended to help creditors).

84. *See, e.g.*, Rinard v. Positive Invs. Inc. (*In re* Rinard), 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011) (explaining that without the automatic stay, the first creditor to the courthouse could collect assets of the debtor to the detriment of all other creditors); *see also* Sec. & Exch. Comm'n v. First Fin. Grp., 645 F.2d 429, 439 (5th Cir. 1981) ("[T]he automatic stay applies to prevent dismemberment of the estate and insure its orderly distribution.").

85. Exactly how much each debtor gets is a complicated matter in bankruptcy. There is a "priority" scheme that essentially places creditors into different levels. Creditors within each level must be paid in full before moving down to the next level. Once the assets are insufficient to pay all creditors within a level, they are distributed pro rata. *See, e.g.*, 11 U.S.C. § 726(a) (describing how property of the estate is distributed in a chapter 7 case). Assuming that Lender One and Lender Two had the same priority, then it is very possible they would simply split the $50,000. Priority, however, is outside the scope of this Note, and this example was offered to show the issue of a race to the courthouse—not detail the complex priority system in a bankruptcy case.

86. H.R. REP. NO. 95-595, at 340.

87. *See* 11 U.S.C. § 362(b) (laying out certain exceptions to the automatic stay); *id.* § 362(d) (providing creditors the opportunity to move to have the stay lifted).

88. *Id.* § 362(b) (listing the exceptions to the automatic stay); *see* BROWN, *supra* note 22, at 31 (detailing the numerous exceptions to the automatic stay but explaining that many do not apply in consumer cases).

limited circumstances.[89] Most commonly, a creditor will move for relief from the stay "for cause," specifically for "lack of adequate protection."[90] For example, if a debtor owes a creditor $10,000 for a car loan, the creditor has a lien of $10,000 on the car, and the car is depreciating rapidly such that in a few months the creditor will only get $7,500, the creditor may successfully move for relief from the stay for lack of adequate protection. In circumstances like this, courts have broad discretion in granting relief from the stay and can do so in multiple ways, such as termination, annulment, or modification of the stay.[91] The automatic stay, therefore, at once protects creditors from unequal distribution of assets yet also remains flexible enough to yield when a creditor appropriately moves for relief.[92]

C. Abuse of the Automatic Stay: Using the Stay as a Sword Against Creditors

Although the automatic stay has the potential to benefit all parties, it also comes with great potential for abuse by the debtor.[93] Such abuse occurs when a debtor repeatedly files for bankruptcy solely to invoke the stay's protection each time a creditor attempts to foreclose on some asset.[94] These debtors are often referred to as repeat-filing, or serial-filing, debtors.

Unfortunately, the potential for abuse of the automatic stay quickly became a reality.[95] In 1994, Congress created the National

89. 11 U.S.C. § 362(d) (providing for stay relief upon motion of a creditor or party in interest). There are essentially only four grounds for relief from the stay: (1) for cause, including lack of adequate protection, (2) debtor has no equity in property, and it is not essential to reorganization, (3) in single asset real estate cases where claim is secured and debtor has commenced monthly plan within ninety days or made payments, and (4) for acts against real property where there is scheme to delay, hinder, or defraud creditors. *Id.*

90. *Id.* § 362(d)(1).

91. BROWN, *supra* note 22, at 38; *see* Alyucan Interstate Corp. v. Aluycan Interstate Corp. (*In re* Alyucan Interstate Corp.), 12 B.R. 803, 806 (Bankr. D. Utah 1981) ("[R]elief may be fashioned to suit the exigencies of the case.").

92. *See* 11 U.S.C. § 362(d) (building in flexibility as to applicability of the automatic stay); H.R. REP. NO. 95-595, at 340 (1977) (explaining that the automatic stay is also intended to help creditors).

93. *See* NAT'L BANKR. REV. COMM'N, *supra* note 2, at 277–79 (reporting that abuse of the automatic stay occurred frequently and needed to be dealt with).

94. *See id.* at 278–79 (noting that repeat filers were one particular source of abuse of the automatic stay).

95. *See* Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 204–08 (2007) (providing an empirical analysis of bankruptcies pre- and post-BAPCPA, which concludes that BAPCPA has had at least some effects upon debtors); Kent Durning, *BAPCPA 10 Years Later: The Effectiveness and Necessity of Bankruptcy Reforms Remain in Question*,

Bankruptcy Review Commission ("NRBC") to examine and propose solutions to issues plaguing the bankruptcy system, including abuse of the automatic stay.[96] The NRBC explicitly pointed out the problem of debtors who "file on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process" and then, once the threat of foreclosure passes, dismiss their case only to refile again once another foreclosure action is brought.[97] In response to this problem, the NRBC suggested in a report that the automatic stay should not go into effect at all for some repeat filings because debtors would then be discouraged "from filing a nonmeritorious . . . petition on the eve of a foreclosure sale merely to stay the sale."[98]

This suggestion found traction in Congress, although it took over eight years to become law.[99] The year after the NRBC released its report, the House Judiciary Committee issued its own report—"Bankruptcy Reform Act of 1998"—calling for termination of the automatic stay for repeat filers.[100] The House Judiciary Committee explained that this provision was designed to prevent exactly the type of abuse of the automatic stay that the NRBC had found to exist.[101] The Senate Judiciary Committee also issued a report with a near identical provision, believing that this provision would "greatly reduce abuses of the bankruptcy system by reducing the incentive to file for bankruptcy repeatedly without completing the bankruptcy process."[102] Over the next seven years, Congress worked to enact this proposed solution until,

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LEXOLOGY (Feb. 5, 2016), https://www.lexology.com/library/detail.aspx?g=4304e377-0fad-47a0-976f-47f882d4364c [https://perma.cc/9ZHD-H539] (describing how immediately before BAPCPA, bankruptcy filings were soaring, which many believed was a result of abusive filings, and deescribing the effects BAPCPA has had on these filings). For example, in 1996, bankruptcy filings surpassed one million, which many thought was far too high. *Id.* Of course, there could have been other variables contributing to this phenomenon, but many believe abusive filings were at least a significant factor. This is bolstered by the fact that there has been a forty percent reduction in cases to which new limitations on the automatic stay apply. *Id.*

96. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602–03, 108 Stat. 4106, 4147 (1994) (creating the NRBC).

97. NAT'L BANKR. REV. COMM'N, *supra* note 2, at 279.

98. *Id.* at 282.

99. *See* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, 199 Stat. 23 (2005) (codified as amended at 11 U.S.C. § 362(c)) (finally codifying these suggestions).

100. H.R. REP. NO. 105-540, at 80 (1998).

101. *See id.* at 80–81 (explaining that some debtors file successive bankruptcy actions to prevent foreclosure and § 121 of the Bankruptcy Reform Act of 1998 remedies this problem by removing the incentive to refile in the first place).

102. S. REP. NO. 105-253, at 39 (1998).

finally, it succeeded in passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[103]

D. Preventing Abuse Through BAPCPA's § 362(c)(3)(A) and Related Provisions

BAPCPA finally codified termination of the automatic stay for repeat filers through the addition of a number of sections, beginning with § 362(c)(3)(A).[104] Section 362(c)(3)(A) applies when the debtor in a chapter 7, 11, or 13 case has already had exactly one bankruptcy case dismissed within the past year.[105] In relevant part, § 362(c)(3)(A) reads that "the stay . . . shall terminate with respect to the debtor on the 30th day after the filing of the later case."[106] Accordingly, for repeat filers, the stay is still automatically triggered at the time of filing, much like it would be for first-time filers; when § 362(c)(3)(A) applies, however, the stay is temporary.[107] The serial-filing debtor is only afforded the protection of the stay for thirty days; the stay will be extended beyond that time only for a debtor who successfully moves for extension of the stay under § 362(c)(3)(B)–(C), through rebutting the presumption of bad faith by clear and convincing evidence.[108] For example, consider a debtor who files for bankruptcy but then becomes medically incapacitated, misses a deadline, and has his case dismissed. This debtor may file again once he recovers, and although the stay would be temporary, he could move for its extension and rebut a presumption of bad faith given the unique circumstances that necessitated refiling.

Without such an extension, however, the debtor is deprived of what is perhaps his most important protection and disincentivized from

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103. *See* 199 Stat. 23 (containing the relevant amendments to the Bankruptcy Code); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485, 518–39 (2005).

104. 11 U.S.C. § 362(c)(3)(A) (terminating the stay after thirty days for second-time filers*); id.* § 362(c)(4)(A)(i) (pausing the stay immediately for debtors with two or more cases dismissed within the past year). These, however, were not the only amendments made by BAPCPA to curb abuse of the bankruptcy system. In particular, the "means test," which is outside the scope of this Note, helped restrict consumer access to chapter 7 where abuse was prevalent. *See, e.g.*, Ransom v. FIA Card Servs., 562 U.S. 61, 64, (2011) ("Congress adopted the means test—'[t]he heart of [BAPCPA's] consumer bankruptcy reforms,' . . . —to help ensure that debtors who *can* pay creditors *do* pay them.") (quoting H.R. Rep. No. 109-31, pt.1, p. 2 (2005)).

105. 11 U.S.C. § 362(c)(3)(A).

106. *Id.*

107. *Compare id.* § 362(a) (laying out the automatic stay for first-time filers), *with id.* § 362(c)(3)(A) (terminating the stay after thirty days for second-time filers).

108. *Id.* § 362(c)(3)(A)–(C) (delineating the applicability of the automatic stay for second-time filers and describing the requirements for extension of the stay).

filing for bankruptcy the second time.[109] Fittingly, this deterrent would largely affect bad-faith debtors at the heart of BAPCPA because they would not be able to satisfy the good-faith requirement necessary for extension, unlike the medically incapacitated debtor from the prior example.[110] While this section may seem clear in theory, its application is far from it.[111] Courts currently agree on the temporality of the stay under § 362(c)(3)(A) but disagree on its breadth—some courts read the section as a total termination of the stay, and others interpret it as a termination of the stay only with respect to actions against the debtor and property of the debtor but not with respect to property of the estate.[112] Therefore, if a serial-filing debtor had a $100,000 house that was property of the estate and personal assets that were the debtor's property totaling $5,000, some courts would hold that all $105,000 worth of assets are unprotected by the stay, while others would hold that only $5,000 worth of assets are unprotected. In the latter courts, the $100,000 house, as property of the estate, is still protected under the stay. Given the importance of property of the estate relative to actions against the debtor and property of the debtor, this disagreement is significant.[113]

Although it has generated an inordinate amount of attention, § 362(c)(3)(A) does not stand alone as the sole means of deterring serial-filing debtors.[114] Most notably, § 362(c)(4)(A)(i), which provides that "the stay . . . shall not go into effect upon the filing of the later case,"

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109. *See* H.R. REP. NO. 105-540, at 15–16 (1998) (explaining the importance of the automatic stay and why terminating it deters repeat filing). As previously described, the automatic stay is a major reason debtors file for bankruptcy, so removing it—or threatening to do so—strips filing for bankruptcy of one of its key advantages. *See supra* note 95 and accompanying text.

110. In fact, when a debtor who has had one case dismissed within the past year refiles, that filing is presumptively in bad faith. 11 U.S.C. § 362(c)(3)(B). The presumption is rebuttable, but a bad-faith debtor who files only to frustrate creditors' collection efforts would likely not be able to provide the clear and convincing evidence required. *See id.* § 362(c)(3)(B)–(C) (outlining the requirements for rebuttal).

111. *See infra* Part II (describing the circuit split that has arisen over the proper interpretation of § 362(c)(3)(A)).

112. *Compare* Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226 (5th Cir. 2019) (interpreting § 362(c)(3)(A) as a partial termination of the stay with respect to only actions against the debtor and the debtor's property and not property of the estate), *with* Smith v. Me. Bureau of Revenue Servs. *(In re* Smith), 910 F.3d 576, 578 (1st Cir. 2018) (interpreting the same section to totally terminate the stay, including with respect to property of the estate). This disagreement has led to a circuit split that is the focus of this Note. *See infra* Part II (analyzing the two competing interpretations of § 362(c)(3)(A)).

113. *See supra* Part I.B (explaining how important property of the estate is and why the automatic stay is particularly critical with respect to it).

114. *See* 11 U.S.C. § 362(c)(4)(A)(i) (going one step further than § 362(c)(3)(A) to terminate the stay immediately for debtors with two or more cases dismissed within the past year); *see also* 11 U.S.C. § 109(g) (forbidding debtors who have had a case pending in the past 180 days from filing).

unambiguously terminates the stay in its entirety immediately upon filing for individuals who have had two or more cases dismissed within the past year.[115] Unlike § 362(c)(3)(A), subsection (c)(4)(A) does not even provide for a temporary stay, although it does allow for a party in interest to impose the stay in certain circumstances.[116] Congress's amendments to the automatic stay thus created an inverse relationship between number of filings and applicability of the automatic stay: when a debtor is a first-time filer, the automatic stay is in full effect; when the debtor has had two or more cases dismissed within a year, the automatic stay never goes into effect absent a successful motion to impose the stay.[117] While § 362(c)(3)(A) falls somewhere in between these two extremes, which side it favors remains open for debate.

II. ANALYSIS: DISTINGUISHING BETWEEN THE MAJORITY AND MINORITY APPROACHES

Since the enactment of § 362(c)(3)(A), courts have developed two main interpretations.[118] Under the majority view adopted by the Fifth Circuit in *Rose v. Select Portfolio Services* in 2019, the automatic stay terminates after thirty days with respect to only actions against the debtor and the debtor's property, remaining in effect with respect to property of the estate.[119] Conversely, under the minority view adopted

115. *Compare* 11 U.S.C. § 362(c)(4)(A)(i) (terminating the stay entirely for debtors with two or more cases dismissed within a year), *with id.* § 362(c)(3)(A) (terminating the stay for debtors who have had just one case dismissed). Notice how § 362(c)(4)(A) does not include the phrase "with respect to the debtor," which has been the basis for the differing interpretations of § 362(c)(3)(A). The absence of this phrase has left § 362(c)(4)(A) relatively unambiguous.

116. *Id.* § 362(c)(3)-(4).

117. *See id.* § 362(c)(3)(B) (setting out how to move for an extension of the stay, which primarily includes a showing of good faith). The increasing level of deterrence makes sense because the more times an individual files for bankruptcy, the stronger the presumption is that the debtor is acting in bad faith and abusing the bankruptcy system. *See* Michael Miller, *Untangling the Web of § 362(c)(3)(A) and its Legislative History*, 39 AM. BANKR. INST. J. 22, 80 (2020) (explaining that § 362(c)(4) complements § 362(c)(3)(A) to deter abusive debtors –but is even stronger).

118. Recall that this Note refers to the two main approaches to the issue as the "majority" and "minority" approaches. Although only two circuits have ruled on the issue, many additional bankruptcy and district courts have been confronted with it. The majority view thus gets its name because a majority of lower courts have adopted it, and the minority likewise gets its name because a minority of lower courts have adopted it. This Note adopts these terms to remain consistent with how these approaches are referenced in case law. *See supra* note 10 and accompanying text.

119. *See, e.g.*, Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 230 (5th Cir. 2019) (laying out the majority view; Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008) (same).

by the First Circuit in *In re Smith* in 2018, the automatic stay terminates in its entirety after thirty days.[120]

A. The Majority View

The majority finds that § 362(c)(3)(A) does not terminate the automatic stay with respect to property of the estate.[121] The Fifth Circuit, one bankruptcy appellate panel, and over fifty district and bankruptcy courts have all adopted this view.[122] To reach this conclusion, the majority takes a textualist approach and uses a litany of statutory construction canons to conclude that § 362(c)(3)(A) unambiguously preserves the automatic stay with respect to property of the estate.[123] Although the majority's reasoning is based on the text, its approach has significant policy implications that cannot be ignored.[124]

1. The Fifth Circuit's Decision in *Rose v. Select Portfolio Servicing, Inc.*

The Fifth Circuit was the first circuit court to adopt the majority approach, with *Rose v. Select Portfolio Servicing, Inc.*[125] This decision created a split within the circuits because another circuit had previously adopted the minority view. For this reason, the Fifth Circuit's decision, while important in its own right, also provides a useful example through which to explore the majority approach.

In *Rose*, the plaintiff, Sharon Rose, and her husband failed to make payments on a house subject to a mortgage.[126] Consequently, defendants, U.S. Bank and Select Portfolio Servicing ("SPS"), sent plaintiff a notice of default and quickly set up a foreclosure sale of the house.[127] Sharon Rose was able to halt the sale through a temporary restraining order, but this only delayed the foreclosure.[128] A few months later, defendants again sent a notice to the plaintiff and set a date for a

120. *See, e.g.*, Smith v. Me. Bureau of Revenue Servs. *(In re* Smith), 910 F.3d 576, 578 (1st Cir. 2018) (laying out the minority view); Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 367–68 (B.A.P. 9th Cir. 2011) (same).

121. *See, e.g.*, *Rose*, 945 F.3d at 229–30.

122. Petition for a Writ of Certiorari at 33a–38a, Rose v. Select Portfolio Servicing, Inc., 2020 WL 1307880 (2020) (No. 19-1035).

123. *See, e.g.*, *Rose*, 945 F.3d (adopting the majority view and creating a circuit split with the First Circuit).

124. *See supra* Part I.A.2

125. 945 F.3d at 230.

126. *Id.* at 228.

127. *Id.*

128. *Id.*

foreclosure sale.[129] This time, however, Sharon Rose filed for bankruptcy, which triggered imposition of the automatic stay and halted the foreclosure.[130] Plaintiff failed to submit necessary filings, however, and the court dismissed her case.[131] Over the course of three years, this process repeated itself three more times.[132] In the end, Sharon Rose filed for bankruptcy four times yet only remained in bankruptcy for a total of 269 days.[133] Nonetheless, she effectively staved off a foreclosure sale during that period.[134]

Because Sharon Rose had one of her filings dismissed within a year of her next one, § 362(c)(3)(A) applied.[135] The court, therefore, had to determine to what extent the automatic stay remained in effect after thirty days.[136] Ultimately, the Fifth Circuit held that the automatic stay terminated only with respect to actions against the debtor and property of the debtor, not with respect to property of the estate.[137] In determining this conclusion, the court laid out the reasoning underpinning the majority approach that this Section will now examine.

2. Textual Arguments

The majority interpretation utilizes the canon of construction stating that where a statute has a plain meaning, courts must give effect to it.[138] In particular, the majority seeks to find a plain meaning of § 362(c)(3)(A), which states that "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."[139] As its first step in finding the plain meaning of this section, the majority looks to nearby § 362(a), which lays out the three categories to which the

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 229.
136. *Id.*
137. *Id.* at 230.
138. *Id.*; *see also* 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 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)) (internal quotation marks omitted).
139. 11 U.S.C. § 362(c)(3)(a).

automatic stay applies: actions against (1) the debtor, (2) property of the debtor, and (3) property of the estate.[140] The problem then lies in finding a way to differentiate for which categories Congress intended the automatic stay to terminate and for which categories Congress intended the automatic stay to still apply, if any.

The majority finds the answer to this issue in § 362(c)(3)(A)'s use of the phrase "with respect to the *debtor*."[141] Under the majority view, this phrase references the first two categories of § 362(a) such that Congress essentially intended it to mean "with respect to the debtor and the debtor's property."[142] Conversely, nowhere does § 362(c)(3)(A) mention the bankruptcy estate.[143] Therefore, by the canon of *expressio unius est exclusio alterius*, which states that the expression of one thing implies the exclusion of the other, the majority finds that Congress intended to terminate the automatic stay with respect to only actions against the debtor and the debtor's property, not with respect to property of the estate.[144]

While this comprises the thrust of the textual argument, the majority supports its conclusion by reference to other sections of the Bankruptcy Code.[145] First, the majority looks to § 362(c)(4) and § 362(h)(1), which both deal with termination of the automatic stay in similar instances.[146] Both of these subsections unambiguously terminate the automatic stay in its entirety.[147] Section 362(c)(4) simply states that the automatic stay "shall not go into effect upon the filing of the later case,"[148] and § 362(h)(1) states that "the stay provided by subsection (a) is terminated with respect to . . . property of the estate or

140. *See id.* § 362(a); *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.").

141. *See* 11 U.S.C. § 362(c)(3)(A) (emphasis added); *Rose*, 945 F.3d at 229 (looking to "with respect to the debtor" to clear up ambiguities).

142. *See* Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 815–16 (B.A.P. 10th Cir. 2008) (using "with respect to the debtor" to terminate the automatic stay with respect to only the debtor and debtor's property).

143. *See* 11 U.S.C. § 362(c)(3)(A).

144. *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. N.Y.C. 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).

145. *See, e.g.,* Wachovia Bank v. Schmidt, 546 U.S. 303, 304 (2006) ("[U]nder the in pari materia canon, the two statutes should be interpreted consistently.").

146. *See Rose*, 945 F.3d at 229–30 (looking to § 362(c)(4)); *In re* Thu Thi Dao, 616 B.R. 103, 111 (Bankr. E.D. Cal. 2020) (looking to § 362(h)).

147. *See* 11 U.S.C. § 362(c)(4) (terminating the automatic stay entirely for those who have had two or more cases dismissed in the past year); *id.* § 362(h)(1) (terminating the automatic stay with respect to personal property of the estate or debtor).

148. *Id.* § 362(c)(4)(A)(i).

of the debtor."[149] The majority then reasons that Congress knew how to terminate the stay in its entirety and that if Congress intended to terminate the stay in its entirety in § 362(c)(3)(A), it would have used language similar to that found in these sections.[150] Instead, however, Congress added the phrase "with respect to the debtor" to § 362(c)(3)(A), which is not found in the other sections.[151] Therefore, the majority concludes that Congress, in using different language, intended for § 362(c)(3)(A) to operate differently and only provide limited termination of the automatic stay.[152]

Further, not only did Congress intentionally use different language, but it also specifically included the phrase "with respect to the debtor" so courts should give it meaning.[153] The majority approach gives this phrase meaning—a meaning critical to resolution of this issue—by using it to distinguish between the categories found in § 362(a).[154] In this way, courts adopting the majority approach avoid creating surplusage.[155] Meanwhile, the majority argues that if courts adopt the minority approach, which terminates the automatic stay in its entirety, they interpret "with respect to the debtor" as superfluous and assume Congress either did not know or did not carefully think about what they were doing when drafting § 362(c)(3)(A).[156] Therefore,

149. *Id.* § 362(h)(1). Perhaps especially compelling is the fact that Congress specified both the debtor and the estate in § 362(h)(1), which it did not specify in § 362(c)(3)(A), because this supports the majority's *expressio unius est exclusio alterius* argument. While the majority argues that even reading § 362(c)(3)(A) in isolation shows Congressional intent, some may not be content that mere omission of the word "estate" leads to the majority's conclusion. Section 362(h)(1), however, bolsters the majority's *expressio unius* argument because it would seem strange that Congress would forget to include both debtor and estate in § 362(c)(3)(A) yet remember to do so just a few sections later. *See supra* note 144 and accompanying text.

150. *See* Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008) ("[I]f 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)."); *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 . . . .").

151. *See* 11 U.S.C. § 362(c)(3)(A) (including "with respect to the debtor"); *see also, e.g.*, *id.* § 362(c)(4) (not including "with respect to the debtor").

152. *See In re Holcomb*, 380 B.R. at 816 (reasoning that Congress's omission was intentional); *In re Williford*, 2013 WL 3772840, at *3 (holding that Congress intentionally omitted reference to the estate).

153. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98 (1995) (holding that each word in a statute should be given meaning).

154. *See* Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 230 (5th Cir. 2019) (giving "with respect to the debtor" the usual majority meaning as a means to distinguish between the categories of subsection (a)).

155. *See Sweet Home*, 515 U.S. at 698 (1995) (stating that courts have "[a] reluctance to treat statutory terms as surplusage"); *In re Holcomb*, 380 B.R. at 815 (laying out the minority interpretation that says "the phrase is superfluous").

156. *See In re Holcomb*, 380 B.R. at 815.

through its exercise of statutory interpretation, the majority finds that § 362(c)(3)(A)'s plain meaning compels courts to terminate the stay with respect to only the debtor and the debtor's property but not with respect to property of the estate.[157]

3. Policy Implications

While the courts in the majority profess that their holdings are mandated by the plain language, they certainly seem cognizant of the policy implications of their view.[158] In particular, the majority view has important effects on three separate parties: the debtor, the creditors, and the trustee in chapter 7 cases. First, the majority's preservation of the automatic stay helps protect the debtor from creditors seeking to pursue and enforce collection actions. In the normal case, this result is desirable because this protection gives the debtor "breathing room" to figure out how best to accomplish a successful bankruptcy.[159] Protection of a serial-filing debtor, however, is antithetical to BAPCPA's goal of deterring abuse of the bankruptcy system because terminating the automatic stay with respect to only the debtor and the debtor's property is a relatively weak deterrent when compared to also terminating the stay with respect to the more valuable property of the estate.[160] While some courts in the majority maintain that this limited termination of the automatic stay still has meaningful consequences, others concede that the majority view does little to accomplish BAPCPA's goals.[161]

For an example of why this issue is so important, one need not look further than the facts of the *Rose* case. Sharon Rose's house, which she defaulted on, became property of the estate each time she filed for bankruptcy.[162] Under the majority approach, therefore, the fact that Sharon Rose was a repeat filer using the bankruptcy system to thwart

157. *See, e.g.*, *Rose*, 945 F.3d at 230; *In re Holcomb*, 380 B.R. at 816 (adopting the majority view).

158. *See, e.g.*, Rinard v. Positive Invs., Inc. (*In re* Rinard), 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011) (explaining that the minority view harms creditors because "a creditor race to the courthouse exists" that does not exist under the majority view).

159. *See* Soares v. Brockton Credit Union (*In re* Soares), 107 F.3d 969, 975 (1st Cir. 1997) (reasoning that the automatic stay provides debtors "breathing room" during period of financial reshuffling).

160. *See* Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 590–91 (1st Cir. 2018) (explaining that the majority view fails to adequately deter serial-filing debtors).

161. *See In re* Roach, 555 B.R. 840, 847 (Bankr. M.D. Ala. 2016) ("The Court acknowledges that the majority view leaves § 362(c)(3)(A) a relatively toothless remedy against repeat filers . . ., but it is not so toothless as to be absurd.").

162. *See Rose*, 945 F.3d at 232 ("There is no debate that the property at issue in this case is part of the bankruptcy estate.").

the defendants' attempted foreclosures essentially did not matter: property of the estate, and thus Sharon Rose's house, remained protected by the stay. In fact, it is hard to see why Sharon Rose or any other debtor in a court following the majority approach would stop at one bankruptcy. Seemingly, these debtors could file as many bankruptcies as there are foreclosure actions until the mortgagee or other creditor gives up. The facts of the *Rose* case, thus, help show that the majority approach allows for continued abuse of the automatic stay that belies the purpose animating BAPCPA.[163]

Despite this issue, the majority view actually helps protect creditors in general. Just as the automatic stay benefits the debtor, it also helps ensure a maximum and equitable distribution to creditors.[164] As noted earlier, although it seems counterintuitive, the automatic stay helps creditors by preventing the first creditor to the courthouse from taking all available assets.[165] Under the majority view, creditors could still enforce actions against the debtor and the debtor's property, but most of the assets in a case would remain protected by preserving the stay with respect to property of the estate, thereby protecting creditors from a race to the courthouse.[166] Therefore, the majority view best protects the interests of creditors in the aggregate and thereby helps accomplish this overarching goal of the Bankruptcy Code.

Additionally, the majority view best protects the chapter 7 trustee.[167] Courts should not ignore the effects on the chapter 7 trustee because § 362(c)(3)(A) specifically applies across chapters 7, 11, and 13.[168] In the chapter 7 context, the trustee generally manages property of the estate and must deal with potential termination of the automatic stay with respect to it.[169] The trustee has a statutory duty to "collect

163. *See* Jensen, *supra* note 103, at 518–539 (2005) (showing that the purpose behind BAPCPA was preventing abuse).

164. *See, e.g.*, BFP v. Resol. Tr. Corp., 511 U.S. 531, 563 (1994) (Souter, J., dissenting) ("[T]hose 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.").

165. *See Rose*, 945 F.3d at 231 (recognizing that while some may think the majority view harms creditors by preventing collection actions, it does not harm them in the aggregate). Additionally, though creditors may want to terminate the stay in certain circumstances, creditors can move for relief from the stay. *See id.* Therefore, creditors are still able to collect during bankruptcy in certain instances even under the majority view. *See id.*

166. *See, e.g.*, Rinard v. Positive Invs., Inc. (*In re* Rinard), 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011).

167. *See In re* Thu Thi Dao, 616 B.R. 103, 106 (Bankr. E.D. Cal. 2020) (discussing how the minority view affects chapter 7 issues in a way that "amounts to throwing the baby out with bathwater").

168. 11 U.S.C. § 362(c)(3).

169. *See In re Thu Thi Dao*, 616 B.R. at 106 (explaining that in a chapter 7 case, the trustee—not the debtor—handles the property of the estate).

and reduce to money the property of the estate," and the automatic stay is critical in helping accomplish this duty because it protects property of the estate from creditors who would take it before the trustee can figure out how best to distribute assets.[170] Therefore, maintaining the automatic stay with respect to property of the estate in a chapter 7 case is necessary to allow the trustee to fulfill his duties.[171]

B. The Minority View

Conversely, the minority view holds that the automatic stay should terminate in its entirety after thirty days, including with respect to property of the estate.[172] The First Circuit in *In re Smith*, along with one bankruptcy appellate panel and twenty lower courts, adopted this interpretation.[173] In contrast to the majority, the minority first concludes that § 362(c)(3)(A) is ambiguous.[174] Consequently, the minority looks to legislative history and purpose and determines that Congress intended to terminate the stay entirely after thirty days.[175] Therefore, the minority view relies much less on the text of § 362(c)(3)(A) and more on congressional intent than the majority, but it nonetheless significantly affects the debtor, creditors, and chapter 7 trustee.

1. The First Circuit's Decision in *In re Smith*

The First Circuit adopted what is now the minority approach in *Smith v. State of Maine Bureau of Revenue Services* (*In re Smith*).[176] In doing so, it became the first circuit to rule on this issue and set the stage for the circuit split created by the Fifth Circuit.[177] The First Circuit's decision in *In re Smith* lays out a standard § 362(c)(3)(A) situation with reasoning typical of courts following the minority approach. Therefore,

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170. 11 U.S.C § 704(a)(1); *see In re Thu Thi Dao*, 616 B.R. at 111 ("A crucial tool in the chapter 7 trustee's toolbox is the automatic stay.").

171. *See id.* at 106 (adopting the majority approach because it protects the chapter 7 trustee).

172. *See, e.g.*, Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 578 (1st Cir. 2018) (laying out the minority view).

173. Petition for a Writ of Certiorari at 33a–38a, Rose v. Select Portfolio Servicing, Inc., 2020 WL 1307880 (2020) (No. 19-1035).

174. *See, e.g.*, *In re Smith*, 910 F.3d at 585 ("[I]ncluding the phrase 'with respect to the debtor' does not on its own obviously support or obviously foreclose either party's reading.").

175. *See infra* Part II.B.3 (detailing how the minority uses legislative history and purpose to come to its conclusion).

176. *See In re Smith*, 910 F.3d at 591.

177. *Id.* at 578 (noting that this was a matter of first impression in the circuit courts).

this case provides a useful glimpse into the real-world application of § 362(c)(3)(A) and helps elucidate the minority approach.

In *In re Smith*, Leland Smith, the debtor, owed the Maine Bureau of Revenue Services ("MRS") $51,596.53 in state taxes, interests, and penalties.[178] Additionally, Smith reported that he owed numerous other creditors for claims, like for unpaid credit card and medical bills, which brought his total debts to roughly $200,000.[179] Leland Smith filed for bankruptcy under chapter 13 and proceeded with his payment plan for about two years until the court dismissed his case for failure to make required payments.[180] Just months later, Leland Smith again filed for bankruptcy under chapter 13, which made § 362(c)(3)(A) applicable.[181]

Like the Fifth Circuit, the First Circuit in this case had to determine the extent to which the automatic stay would apply to a repeat filer such as Leland Smith.[182] Contrary to the Fifth Circuit, however, the First Circuit embraced the minority approach that had existed among lower courts since shortly after BAPCPA was passed and held that the automatic stay terminated entirely after thirty days, including for the property of the estate.[183] The court engaged with the majority approach's reasoning but ultimately found the reasoning of the minority approach to be more compelling.[184] This reasoning used by the First Circuit, as well as other minority view courts, will now be examined.

2. Textual Ambiguity

Many lower courts have joined the First Circuit in the minority approach. The minority, like the majority, begins with the text, but, unlike the majority, finds no plain meaning.[185] First, the minority attacks the majority's foundational assumption and argues that no language in § 362(c)(3)(A) mirrors language in § 362(a), so they should

178. *Id.* at 579.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 578.
183. *Id.*
184. *See id.* at 580–91(engaging in a detailed analysis of textual and policy arguments common to both the majority and minority approaches).
185. *See, e.g.*, *id.* at 580, 585 ("[I]ncluding the phrase 'with respect to the debtor' does not on its own obviously support or obviously foreclose either party's reading.").

not be read together.[186] To this point, the minority rejects the argument that Congress intended "with respect to the debtor" to distinguish between the categories of § 362(a).[187] While the minority has proposed a number of reasons for this conclusion, perhaps the most compelling is the spousal exclusion argument.[188] Under this view, " 'with respect to the debtor' can be read as referring to the serially-filing spouse" and was not used to distinguish between the categories in subsection (a).[189] The minority finds this interpretation especially strong because § 362(c)(3) specifically applies to "single or joint case[s]."[190] Alternatively, the minority finds that § 362(c)(3)(A) is simply a poorly written statute, so courts should not assume "with respect to the debtor" has any meaning.[191] In support of this interpretation, the minority notes that every instance in which Congress includes "with respect to the debtor" in the Bankruptcy Code is mere "filler."[192] As a result, "with respect to the debtor" does nothing to add clarity to § 362(c)(3)(A).[193]

Further, the minority reasons that its interpretation does not create more surplusage than necessary but rather gives force to the rest of the section, ultimately reducing surplusage.[194] Sections 362(c)(3)(B)–(C) allow for "a party in interest" to extend the automatic stay beyond thirty days if they carry the requisite burden of good faith.[195] First, the minority argues that if the automatic stay does not terminate with

186. *See id.* 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).

187. *See id.* at 581, 583 (holding that "with respect to the debtor" is not conclusive).

188. *See In re* Daniel, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009) (setting forth the spousal exclusion argument).

189. *Id.*

190. 11 U.S.C. § 362(c)(3); *see In re Daniel*, 404 B.R. at 326–27 (determining that the spousal exclusion argument, finding support in the statute's language, is the most plausible reading of the law).

191. *See In re Smith*, 910 F.3d at 584 (holding that § 362(c)(3)(A) is not an example of precise drafting, so courts should not rigorously apply canons of construction); King v. Burwell, 576 U.S. 473, 491–92 (2015) (holding that where a statute is not artfully drafted, courts should not be bound to give every word meaning).

192. 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 fillers).

193. Although the minority does not deal much with the majority's arguments concerning § 362(c)(4) and § 362(h), removing "with respect to the debtor" as important in distinguishing between the categories of § 362(a) implicitly makes § 362(c)(3)(A)'s language more similar to other sections that unambiguously terminate the stay in its entirety.

194. *See In re Smith*, 910 F.3d 576, 588 (explaining that the minority view is more consistent with nearby sections).

195. 11 U.S.C. § 362(c)(3)(B)-(C).

respect to the estate, these sections will almost never be used.[196] Property of the estate comprises most of the assets within a case, so parties in interest will likely only care about protection in this context enough to move to extend the automatic stay.[197] Thus, under the majority view, 364 of the 472 words found in § 362(c)(3) would be deprived of practical value.[198] Second, § 362(c)(3)(B) allows "any party in interest" to move for extension but if the automatic stay never terminates with respect to property of the estate, then only the debtor will ever move for extension because creditors do not care about actions against the debtor or property of the debtor.[199] Consequently, the majority approach would specifically render the "any party in interest" language surplusage.[200]

By giving meaning to these sections, the minority not only avoids creating surplusage but also builds in a flexibility device that can help blunt undesirable consequences that may result from termination of the automatic stay.[201] For example, if termination of the automatic stay posed great harm to creditors or the trustee, they could, as a party in interest, move to extend the stay, and the court could then grant their motion. Accordingly, the minority argues that the majority view does not make sense in the context of the rest of the statute, so the text should be deemed ambiguous.[202]

3. Legislative History and Purpose

Upon finding the statutory text ambiguous, the minority follows the norms of statutory interpretation and turns to legislative history to support the conclusion that Congress intended to terminate the automatic stay in its entirety after thirty days.[203] To begin the review

196. *See* Reswick v. Reswick (*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)").

197. *See In re Smith*, 910 F.3d at 588 (explaining that the extension of the stay would be used in very limited circumstances).

198. *See* Smith v. Me. Bureau of Revenue Servs., 590 B.R. 1, 17 (D. Me. 2018) (holding that it would be illogical to make the majority of a section meaningless), *aff'd sub nom.* Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576 (1st Cir. 2018).

199. *See In re Smith*, 910 F.3d at 588 (reasoning that the "party in interest" phrase would be meaningless under the majority view).

200. *See id.*

201. *See* 11 U.S.C. § 362(c)(3)(B)-(C) (dealing with extension of the stay for repeat filers); *In re Smith*, 910 F.3d at 588 (explaining that the minority view is more consistent with nearby sections).

202. *See In re Smith*, 910 F.3d at 588–589.

203. *See, e.g.*, Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985) (showing that when the text is ambiguous, courts can turn to legislative history to find meaning); *see also In re Smith*, 910 F.3d at 589–91 (using legislative history to reach the minority view conclusion); Stephen

of relevant legislative history, the minority starts with Congress's creation of the NBRC, designed to study problems related to the Bankruptcy Code and recommend solutions.[204] Pursuant to recommendations of this commission, the House Judiciary Committee suggested amending § 362(c) by adding a new paragraph nearly identical to the current § 362(c)(3).[205] In support of this amendment, the committee report explained:

> 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.
>
> Section 121 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.[206]

The Senate Judiciary Committee also issued a report commenting on a provision essentially identical to § 362(c)(3)(A) that stated that "the automatic stay shall terminate with respect to the property or debtor," which will "greatly reduce abuses of the bankruptcy system."[207] Once this language, in near identical form, finally made it into the Bankruptcy Code, a House Judiciary Committee Report simply explained that § 362(c)(3)(A) was designed to "terminate the automatic stay within 30 days" for a debtor who had previously filed and had a case dismissed within the past year.[208]

The minority finds support for its interpretation from the legislative history.[209] First, the minority concludes that Congress included the stay termination provision in § 362(c)(3)(A) as a means to stop bad-faith serial filings.[210] This conclusion hardly seems surprising

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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.").

204. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602-03, 608, 108 Stat. 4106, 4147, 4149.

205. *See* H.R. REP. NO. 105-540, at 15–16 (1998).

206. *Id.* at 80.

207. S. REP. NO. 105-253, at 39 (1998).

208. H.R. REP. NO. 109-31(I), at 69 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 138.

209. *See* Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 589–91 (1st Cir. 2018) (turning to legislative history and congressional intent to conclude that the stay should terminate entirely).

210. *See In re* Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009) (analyzing the legislative history of § 362(c)(3)(A)).

since the title of BAPCPA calls for bankruptcy abuse prevention.[211] The minority also points out, however, that nowhere in the seven-year legislative history of this provision is there any distinction drawn between the debtor and property of the estate based on the phrase "with respect to the debtor."[212] These two conclusions make sense together. With no distinction, § 362(c)(3)(A) terminates the stay entirely, which acts as a far greater deterrent to bad-faith serial filings when compared to termination with respect to only actions against the debtor and property of the debtor.[213] Therefore, the minority finds that the legislative history supports total termination of the automatic stay.

4. Policy Implications

The minority approach's focus on legislative history and purpose as opposed to the plain language allows for a more explicit policy-based justification. Although the minority view is most concerned with the deterrent effects upon repeat-filing debtors, it also affects creditors and the chapter 7 trustee.[214]

Pursuant to Congress's intent to deter repeat filing and abuse of the bankruptcy system, the minority approach imposes a relatively strong deterrent that strips the serial-filing debtor of the automatic stay's protection against creditors seeking to enforce collection actions.[215] Total termination acts as a deterrent because all the debtor's property, including property of the estate, remains vulnerable even though the debtor has filed for bankruptcy, which normally provides protection.[216] Consequently, the debtor is disincentivized from refiling for bankruptcy, thus reducing abuse of the bankruptcy filing process.

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211. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

212. *See In re Daniel*, 404 B.R. at 329 (holding that the legislative history does not discuss "with respect to the debtor" as a means to distinguish between the categories of subsection (a)).

213. *See id.* (concluding that the minority view best accomplishes Congress's goals in enacting BAPCPA).

214. *See In re Smith*, 910 F.3d at 590 (using congressional intent to deter abusive filings by debtors as the driving factor in its interpretation).

215. *See id.* (holding that the minority interpretation is the best deterrent to bankruptcy abuse and repeat filing); *In re* Thu Thi Dao, 616 B.R. 103, 111–12 (Bankr. E.D. Cal. 2020) (reasoning that the minority courts disregard the effects on creditors and the chapter 7 trustee).

216. *See* S. REP. NO. 105-253, at 39 (1998) (explaining that Congress intended the termination of the automatic stay to act as a deterrent to abusive filings). In contrast, the majority view does comparatively little to deter serial filers because even if the stay were to terminate, almost all assets would still be protected as property of the estate. *See In re* Roach, 555 B.R. 840, 847 (Bankr. M.D. Ala. 2016) ("The Court acknowledges that the majority view leaves § 362(c)(3)(A) a relatively toothless remedy against repeat filers . . ., but it is not so toothless as to be absurd.")

For example, consider the facts of *In re Smith*: Leland Smith owed roughly $200,000 to creditors, and the vast majority of his assets were property of the estate.[217] After Leland Smith's first filing, under the minority approach, it did not matter whether or not he was in bankruptcy because his property was entirely unprotected either way, and the creditors could go after it to satisfy the $200,000 they were collectively owed.[218] While deterrence to file in general would be undesirable in the bankruptcy system, in this instance it is the virtue of the minority approach because it helps accomplish exactly what Congress intended.[219] Although the minority approach is in line with the broad policy of BAPCPA, it has certain pitfalls that put it at odds with general policies of the Bankruptcy Code.

The harmful effects on creditors imposed by total termination of the automatic stay best explain why courts have been reluctant to adopt the minority approach.[220] First and foremost, the minority approach incentivizes the race to the courthouse anticipated, and frowned upon, by courts adopting the majority view.[221] Therefore, in cases with more than one creditor, all but the first creditor to collect likely will be harmed by total termination of the automatic stay. This harm to the other creditors occurs because the debtor's assets are often insufficient to pay back all the debts owed to creditor.[222] When this is the case, the bankruptcy system calls for fair and equitable distribution of assets to creditors, and the automatic stay helps ensure this distribution by protecting all assets until such disbursement can be planned.[223] Removing the automatic stay entirely exposes assets such that a single

217. *In re Smith*, 910 F.3d at 579.

218. *See id.* at 591 (terminating the automatic stay, which would allow MRS and other creditors to pursue collection actions against the estate).

219. *See* Jensen, *supra* note 103, at 518–39 (2005) (explaining how abuse animated the passage of BAPCPA).

220. *See, e.g.*, Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 231 (5th Cir. 2019) (recognizing the importance of the automatic stay in protecting creditors and using it as justification to adopt the majority instead of the minority approach). This major downside of the minority approach is essentially the strength of the majority approach. *See supra* Part II.A.3.

221. *See, e.g.*, Rinard v. Positive Invs., Inc. (*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").

222. *See* BROWN, *supra* note 22, at 89, 115 (explaining that even in successful chapter 13 cases, oftentimes less than one hundred percent of debts are repaid and that in chapter 7 there are often no assets, let alone enough to pay back all debts). Debtors are often able to pay less than one hundred percent because creditors will negotiate to ensure they receive at least some compensation. Then upon discharge, the debtor's debts are forgiven, with some exceptions. *See* 11 U.S.C. § 524 (explaining the effects and benefits of a discharge).

223. *See, e.g.*, BFP v. Resol. Tr. Corp., 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (explaining that fair and equitable distribution of assets is a key goal of the Bankruptcy Code).

creditor could collect all assets to satisfy the debt owed to them.[224] This first creditor will be satisfied, but all others will be left with a debtor without anything else to distribute.[225]

Leland Smith, for example, owed MRS but also owed many other creditors.[226] Given that MRS had a claim of over $50,000, it is possible under the minority approach that MRS could seize all of Leland Smith's assets if they totaled less than MRS's claim, leaving other creditors who had unpaid bills with nothing.[227] The minority approach thus undermines a key goal of the Bankruptcy Code: its protection of creditors.[228]

Additionally, the minority approach's focus on the policy effects upon the debtor suffers from tunnel vision and neglects consideration of the trustee in a chapter 7 case.[229] This is no trivial omission, either. Chapter 7 bankruptcies accounted for sixty-two percent of all filings in 2019, and Congress made § 362(c)(3)(A) applicable to cases under chapter 7.[230] Because there is no debtor-in-possession provision in chapter 7, unlike chapters 11 and 13, the trustee manages the debtor's property and must "collect and reduce to money the property of the estate."[231] This means that the termination of the automatic stay in the chapter 7 context will certainly inhibit the trustee's ability to carry out his duties. As a result, the trustee is hard pressed to collect and reduce to money property of the estate because there will be no property of the

224. *See supra* Part I.B.2 (explaining the importance of the automatic stay, especially with respect to property of the estate).

225. This is the very essence of the "race to the courthouse" problem and why, in general, creditors do not benefit under the minority approach. It would be far too risky for creditors to advocate for the minority approach, betting that they could get to the courthouse first to secure a judgment. *See In re Rinard*, 451 B.R. at 19 (explaining why the race to the courthouse is a problem).

226. Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 579 (1st Cir. 2018).

227. To be clear, the decision in this case does not say how assets were distributed after the court adopted the minority approach. This is a hypothetical designed to illustrate the problem of a race to the courthouse using familiar facts. *See id.*

228. *See, e.g.*, *BFP*, 511 U.S. at 563 (Souter, J., dissenting).

229. For this issue to have effect, the debtor would first have passed the means test to be able to file for chapter 7. The means test itself is a deterrent to abusing the bankruptcy system because prior to BAPCPA, many thought debtors would file chapter 7 bankruptcies to avoid paying creditors. *See supra* note 25 and accompanying text (explaining the means test and its rationale). The minority could point to this as an indication that the chapter 7 trustee issue is insignificant because the means test weeds out abusive debtors before § 362(c)(3)(A) is even needed.

230. 11 U.S.C. § 362(c)(3)(A); *see In re* Williams, 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006) ("[S]ubsection (c) applies in all bankruptcy cases, including chapter 7 cases."); *In re* Thu Thi Dao, 616 B.R. 103, 107 (Bankr. E.D. Cal. 2020) ("Nor is the inclusion of chapter 7 in § 362(c)(3) a sideshow; rather, chapter 7, which comprises 60 percent of all bankruptcy filings, is the main event. It is the chapter 13 decisions that amount to tail wagging dog."); UNITED STATES COURTS, BAPCPA REPORT - 2019, https://www.uscourts.gov/statistics-reports/bapcpa-report-2019 (last visited Feb. 18, 2022) [https://perma.cc/J42L-M69T].

231. 11 U.S.C § 704(a)(1).

estate left when creditors can enforce their collection actions.[232] Moreover, the statutory deadlines and burdens necessary to succeed on a motion for extension of the stay are nearly impossible for the trustee to satisfy.[233] The trustee, therefore, likely cannot adequately do his job under the minority approach.[234]

III. SOLUTION: A MODIFIED MAJORITY APPROACH

As the situation currently stands, both the majority and minority approaches lead to undesirable outcomes.[235] The majority's textualist approach helps protect the creditor and chapter 7 trustee but allows abuse to persist by failing to adequately deter serial-filing debtors, and it thus fails to accomplish Congress's goals.[236] On the other hand, the minority approach best deters serial-filing debtors but strips creditors and the chapter 7 trustee of the benefits of the stay in the process.[237] Therefore, a different approach is needed to best accommodate all parties.

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232. *See In re Thu Thi Dao*, 616 B.R. at 111 ("A crucial tool in the chapter 7 trustee's toolbox is the automatic stay."). Often, however, chapter 7 cases have no assets, so there is nothing to "collect and reduce to money." Therefore, the chapter 7 trustee concerns may not be as severe and may only apply in the cases where there are assets. *See* BROWN, *supra* note 22, at 96.

233. *See* 11 U.S.C. § 362(c)(3)(B)-(C) (explaining that a motion must be filed within thirty days and be supported by clear and convincing evidence); *In re Thu Thi Dao*, 616 B.R. at 111 (explaining the problems of the minority approach in a chapter 7 case). The problem with the thirty-day deadline is that the trustee knows next to nothing about the case at this time, especially since the meeting of creditors—where the trustee learns about the case—often does not occur within thirty days. *See* 11 U.S.C. § 341 (setting requirements for the meeting of creditors); *In re Thu Thi Dao*, 616 B.R. at 112 (detailing how the trustee does not know enough within thirty days to carry his burden). Additionally, the clear and convincing burden of proof exacerbates this problem because it is nearly impossible to satisfy with limited information. *See* 11 U.S.C. § 362(c)(3)(C) (setting the burden of proof for motions for extension of the stay); *In re Thu Thi Dao*, 616 B.R. at 113 (arguing that "the § 362(c)(3)(C) burden of proof for requests to preserve the stay is impossible for a chapter 7 trustee to satisfy"). For a useful comparison, albeit in a slightly different context, see 11 U.S.C. § 362(h) (requiring the trustee to persuade the court within a more flexible timeframe that the stay should not terminate); *In re Thu Thi Dao*, 616 B.R. at 114–15 (arguing that requirements like those in § 362(h) make more sense than those in § 362(c)(3)(A)).

234. *See In re Thu Thi Dao*, 616 B.R. at 107 (arguing that the minority approach makes the trustee's job extremely difficult).

235. *See infra* Part II (describing the majority and minority approaches along with their shortcomings).

236. *See* Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 590–91 (1st Cir. 2018) (explaining that the majority view fails to adequately deter serial-filing debtors).

237. *See, e.g.*, *In re Thu Thi Dao*, 616 B.R. at 107 (describing the effects the minority approach would have on the chapter 7 trustee); Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 231 (5th Cir. 2019) (recognizing the importance of the automatic stay in protecting creditors and using it as justification to adopt the majority instead of the minority approach).

A. Creating a Modified Majority Approach

A legislative redrafting of § 362(c)(3)(A) that adopts a modified majority approach would best accommodate all involved parties. Like the majority approach, this solution would first make clear that the automatic stay under § 362(c)(3)(A) terminates with respect to only actions against the debtor and property of the debtor, not with respect to property of the estate.[238] Unlike the majority approach, however, this solution would help alleviate the concerns raised by the minority approach by creating a presumption in favor of motions for relief that is rebuttable by any party in interest.[239] In short, this solution proceeds in three parts: it (1) terminates the automatic stay except with respect to property of the estate and (2) creates a presumption in favor of relief from the stay when § 362(c)(3)(A) applies that is (3) rebuttable by any party in interest.

The cleanest way to accomplish the first step of terminating the automatic stay with respect to only actions against the debtor and property of the debtor is to redraft § 362(c)(3)(A).[240] Even though this section can be interpreted as the majority interprets it, redrafting would clarify the textual ambiguities that have divided courts over the past fifteen years and explicitly rule out the minority approach. Congress must ultimately amend the text, but this solution proposes that it be changed as follows:

> § 362(c)(3)(A): the stay under subsection (a) with respect to any action taken with respect to a debtor or property securing such debt or with respect to any lease shall terminate with respect to *actions against the debtor and property of the debtor, but not with respect to property of the estate,* on the 30th day after the filing of the later case.

This redrafting directly responds to the problems that courts have found with § 362(c)(3)(A). In particular, the confusing and divisive phrase "with respect to the debtor" would be removed in favor of a more explicit explanation of the extent of the termination of the automatic

238. *See, e.g.*, *Rose*, 945 F.3d at 230 (showing that the majority approach terminates the automatic stay with respect to only actions against the debtor and property of the debtor, not with respect to property of the estate).

239. *See supra* Part II.A.3 (explaining that the majority approach does little to deter abusive debtors).

240. Although not entirely necessary, redrafting § 362(c)(3)(A) would clear up the issues that have plagued the lower courts for years. *See supra* Part II (analyzing the circuit split). Additionally, the second part of this solution would require an amendment to the Bankruptcy Code, so redrafting § 362(c)(3)(A) at the same time would make sense. It is also worth noting that while § 362(c)(3)(A) should be amended, subsections (c)(3)(B)-(C) should be left alone. *See* 11 U.S.C. § 362(c)(3). While extension for the stay would be less important under this solution, a party in interest would still need it if they wanted to extend the automatic stay for actions against the debtor or property of the debtor.

stay.[241] Effectively, this new language removes the ambiguities identified by the minority view and strengthens, if not outright adopts, the majority's position.

The modified majority approach would then work through a series of burden shifts that would ultimately help deter serial-filing debtors. Under current bankruptcy law, creditors could move for relief from the stay protecting property of the estate, but they would need to carry the burden of proof to succeed, which is no small task.[242] For example, under § 362(d)(4), a creditor may be able to obtain relief from the stay where the debtor filed as "part of a scheme to delay, hinder, or defraud creditors," which is often applicable to repeat filers, but to succeed a creditor would need to prove a number of elements, including common law fraud.[243] The modified majority approach, however, would establish a presumption in favor of granting relief from the stay, which would help creditors avoid having to establish difficult elements, like fraud. Although this would place the burden on the debtor, who likely has less resources, the debtor would only need to show good faith, not something like fraud, to rebut such a presumption and could do so concurrently with the filing of their second case. To establish this framework, Congress should add a new subsection, § 362(c)(3)(D), to the existing § 362(c)(3):

> § 362(c)(3)(D): on the motion of a party in interest for relief from the automatic stay and upon notice and a hearing, the court shall presume that the later filing was made in bad faith such that the motion for relief from the automatic stay shall be presumptively granted unless the debtor can rebut this presumption by clear and convincing evidence or another party in interest can demonstrate undue hardship that would occur by granting relief.

Accordingly, creditors can more easily move for relief where there is bad faith. In situations where good faith can be established, the burden will shift back to the creditor to prove the elements necessary for relief, like in a normal case, but this particular burden-shifting framework is preferable because § 362(c)(3) is only designed to deter bad-faith debtors, not to disadvantage those filing in good faith.[244]

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241. *See* 11 U.S.C. § 362(c)(3)(A); *Rose*, 945 F.3d at 229–30 (looking to "with respect to the debtor" to clear up ambiguities).

242. 11 U.S.C. § 362(g).

243. 11 U.S.C. § 362(d)(4). This section applies specifically to cases involving multiple filings affecting real property, so it is very relevant to the § 362(c)(3)(A) issue. The courts, however, have read this section to impose multiple elements that must be satisfied for a successful motion: (1) a scheme, (2) to delay, hinder, *and* defraud, (3) involving transfer of ownership or multiple filings affecting real property. *See, e.g.*, *In re* Muhaimin, 343 B.R. 159 (Bankr. D. Md. 2006) (denying a motion for relief for a repeat filing debtor because not all elements of § 362(d)(4) were met).

244. *See, e.g.*, *In re* Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009) (explaining that the purpose behind § 362(c)(3)(A) was to deter abusive debtors who file repeatedly to gain the

This new subsection would also allow other parties, like creditors or the trustee, to overcome the presumption in favor of granting relief in situations where relief to one creditor would harm other parties.[245] This approach makes sense because these parties are not the bad-faith debtor that § 362(c)(3) should deter, so they should not be punished for the debtor's repeat filings.[246] While some may argue that this issue could be solved by adopting the minority approach and allowing for extension of the stay, the modified majority approach works better because relief from the stay is more individualized than extension or termination of the stay.[247]

For an illustration of this solution, consider facts similar to those present in *Rose v. Select Portfolio Servicing, Inc.*[248] Suppose a debtor failed to make payments on his house to First Bank and also owes Visa $5,000 for missed credit card payments. In an effort to stave off foreclosure actions, the debtor repeatedly files for bankruptcy each time a foreclosure action arises. Under the modified majority approach, § 362(c)(3)(A) would protect all these assets because they are part of the estate, and First Bank and Visa would not need to rush to the courthouse to attempt to seize assets first. Instead, First Bank could simply move for relief from the automatic stay under the newly added § 362(c)(3)(D) and foreclose on the home once the stay was granted. Because there are other assets in the estate that remain protected, neither Visa nor a potential chapter 7 trustee will need to object.[249] The

protection of the automatic stay). This is essentially the rationale behind § 362(c)(3)(B)-(C) as well. Those sections, which deal with motions for extension of the stay, would allow good-faith debtors to extend the stay, which essentially allows the bankruptcy to proceed as if there was no repeat filing. *See* 11 U.S.C. § 362(c)(3)(B)-(C) (explaining that proving good faith can rebut the presumption against repeat filers and allow for extension of the stay). This solution involving relief from the stay is complementary to that.

245. Again, this is similar to the motions for extension of the stay that allow for any "party in interest" to move for extension. *See* 11 U.S.C. § 362(c)(3)(B).

246. Similar to the good-faith debtor who was forced to file repeatedly, the purpose behind BAPCPA does not call for punishment of creditors, the trustee, or other parties in interest simply because the debtor may be filing in bad faith. To hold these parties accountable for the debtor's bad faith would be illogical.

247. *See* 11 U.S.C. § 362(c)(3) (providing a procedure for extension of the stay rather than relief from the stay); *see also supra* Part II.B (explaining that this is essentially how the minority view already operates).

248. *See* 945 F.3d 226, 228 (5th Cir. 2019); *see also supra* Part II.A.1 (summarizing the facts of the *Rose* case).

249. Even if there were no other assets in the estate in this example, Visa likely would not be able to successfully object to First Bank's motion. While beyond the scope of this Note, a creditor like First Bank would have priority as a secured creditor such that even if there were other creditors, the secured creditor would receive the collateral. The important thing to note, however, is that the motion for relief is specific to the house: the rest of the property in the estate remains subject to the stay. Additionally, since the assets would need to be distributed anyway to First Bank, the trustee would not need to object.

debtor will likely try to rebut the presumption of bad faith, but this will be extremely difficult because he has shown through repeat filings that his only intent in filing for bankruptcy was to frustrate First Bank's attempt to foreclose. Therefore, the debtor will be deterred from refiling, and all other parties will either get the assets they are owed or remain properly protected.

B. Implications of the Modified Majority Approach

The modified majority approach provides a significant deterrent to repeat-filing debtors. Initially, like under the majority approach, the automatic stay will terminate with respect to only the debtor and property of the debtor. This limited termination provides some disincentive to refiling, albeit minimal, as the minority courts suggest.[250] The modified majority approach, however, adds a further deterrent. Although the stay will remain in effect with respect to property of the estate initially, shifting the burden from creditors to the debtor on motions for relief from the stay removes much of the stay's protection power.[251]

For example, consider a bad-faith debtor who files solely to prevent foreclosure, like in the example above. Under the modified majority approach, the debtor can either (1) complete the bankruptcy process the first time or (2) let his case get dismissed and refile. Refiling, however, would be pointless because the stay would likely be lifted, especially since a bad-faith debtor would have a difficult time carrying his burden of proof. Therefore, abusive filings would be deterred from the outset, and debtors would be incentivized to complete the bankruptcy process the first time. While some may argue that the minority approach better deters serial-filing debtors by terminating the stay with respect to property of the estate outright, the modified majority approach still acts as a substantial deterrent by terminating the stay with respect to the debtor and debtor's property and significantly weakening the stay's effectiveness with respect to property

250. *See* Smith v. Me. Bureau of Revenue Servs. (*In re* Smith), 910 F.3d 576, 590–91 (1st Cir. 2018) (acknowledging that the majority view has a limited deterrent effect relative to the minority view).

251. Compare this solution with the existing framework for motions for relief from the stay. 11 U.S.C. § 362(g). As one can see, the burden under the modified majority approach would be significantly less than it is under the current approach. *See also supra* note 243 and accompanying text.

of the estate while also taking into consideration the shortcomings of the minority view.[252]

To this point, the modified majority approach would benefit creditors in a number of ways. Most importantly, it addresses the race to the courthouse issue that the majority approach detailed.[253] By initially keeping the stay in place, the race to the courthouse simply does not exist. Although actions against the debtor and debtor's property could proceed, most of the property would still be protected, and creditors would have little incentive to be the first to the courthouse.[254] Further, a presumption in favor of granting motions for relief from the stay would likewise not create a race to the courthouse. The motions for relief would be more particularized such that the stay would only be lifted with respect to certain assets identified by the movant, and all other assets would remain protected. For instance, in the above example, First Bank would only move for relief from the stay with respect to the house subject to the mortgage, leaving the $20,000 in other assets protected.

Moreover, in the event that a motion for relief from the stay appears unfair to involved parties, the other creditors—or the trustee—could simply file an objection to it and prevent decimation of assets that should remain in the estate.[255] While the modified majority approach requires some additional effort on behalf of creditors, this is unavoidable under any approach, as they would either need to file motions for relief, like here, or file motions to extend the stay to prevent a race to the courthouse, like in the current minority approach.[256] Therefore, the modified majority approach at once protects creditors by keeping the stay intact with respect to property of the estate, but it also creates an easier process by which to remove the stay with respect to assets they are owed.

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252. *See supra* Part II.B.4 (explaining that the entire minority approach is premised on its deterrent effect).

253. *See, e.g.*, Rinard v. Positive Invs., Inc. (*In re* Rinard), 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011) (explaining that without the automatic stay, the first creditor to the courthouse could collect assets of the debtor to the detriment of all other creditors).

254. *See supra* Part I.B.1 (explaining that property of the estate comprises almost all assets in a bankruptcy case).

255. The rationale behind this is similar to that of extension for the stay under the current Bankruptcy Code. 11 U.S.C. § 362(c)(3)(B). The reason that § 362(c)(3)(B) allows any "party in interest" to extend the stay is so that they are not harmed by termination of the stay. The modified majority approach captures the full strength of that reasoning, while also creating a more workable system that protects all parties better.

256. *See* 11 U.S.C. § 362(c)(3)(B)-(C) (describing how to file a motion for extension under the current approach); *see also* 11 U.S.C. § 362(d) (describing the process for motions for relief in general).

The modified majority approach also remedies any issues concerning the chapter 7 trustee. Like under the majority approach, keeping the stay in effect with respect to property of the estate allows the trustee to properly carry out administration of the estate because assets remain protected until they can be distributed.[257] Although creditors will be able to obtain relief from the stay more easily, the trustee will not be harmed because the relief will be more particular to the moving creditor compared to total termination of the stay— and even if the relief would not be appropriate, the trustee could simply object.[258] Accordingly, the information needed to object would be more particular to the creditor and thus easier to obtain than trying to get the information about the debtor and his assets necessary to extend the stay.[259] Therefore, the modified majority approach protects the trustee by default and, in situations where the stay may be lifted, alleviates the timing and burden of proof woes that exist under the minority approach.[260]

CONCLUSION

Section 362(c)(3)(A) of the Bankruptcy Code may have been well intentioned in its aim to prevent abuse of the bankruptcy system, but it is fraught with issues both in its drafting and its policy implications. These issues have led to the current, and worsening, circuit split over whether the automatic stay should remain in effect with respect to property of the estate after thirty days for serial-filing debtors. Much of this debate centers on which interpretation can best deter repeat-filing debtors while also protecting creditors and the chapter 7 trustee. In this respect, both current interpretations fail.

This Note proposes a novel solution that would (1) keep the stay in effect with respect to property of the estate and (2) create a presumption in favor of granting relief from the stay that is (3) rebuttable by a party in interest, including the debtor, other creditors, and the trustee. This more nuanced approach would require legislative redrafting of § 362(c)(3)(A) and would act as a middle ground between

257. *See, e.g.*, *In re* Thu Thi Dao, 616 B.R. 103, 107 (Bankr. E.D. Cal. 2020) (advocating for the majority approach in the context of a chapter 7 case).

258. *See supra* note 229 and accompanying text (describing the burdens of the trustee under the minority approach).

259. *See, e.g.*, *In re Thu Thi Dao*, 616 B.R. at 112 (describing why the chapter 7 trustee would face impossible deadlines and burdens under the minority approach).

260. *See id.* (illustrating the problems of the minority approach relevant to the chapter 7 trustee).

the two current approaches to best accommodate all interests at stake.

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