NO. 13-700

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DAVID LAMAR SINKFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN OPPOSITION TO CERTIORARI

TARA TWOMEY
Counsel of Record
NATIONAL CONSUMER
BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256
ttwomey@me.com

Dated: February 28, 2014

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of more than 3,500 consumer bankruptcy attorneys practicing throughout the country. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors.

Among other things, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys. NACBA has filed amicus briefs in this Court in several cases involving the rights of consumer debtors. *See, e.g.*, *Schwab v. Reilly*, 560 U.S. 770 (2010); *United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

NACBA's mission includes ensuring that consumer debtors' viewpoints are fully developed and presented to the courts on appeal. *This* case, which is based on a stipulated judgment in all the lower courts, has short-circuited the appellate process and limited the opportunity to advance the consumer debtors' perspective. So while the debtor's ability to eliminate a mortgage lien when no value in the collateral supports that lien is an issue of substantial importance to NACBA, review of this case by the Court would be premature. *McNeal v. GMAC Mortgage, L.L.C.*, 735 F.3d 1263 (11th Cir. 2012), which forms the basis for the stipulated judgment in this case, still remains pending in the Eleventh Circuit Court of Appeals, where the court has not yet acted on a petition for rehearing *en banc*. Another case,

Wilmington Trust, N.A. v. Malone, Docket No. 13-13688 (11th Cir.) is also fully briefed in the Eleventh Circuit Court of Appeals, with a motion for initial hearing *en banc* pending.[1]

SUMMARY OF ARGUMENT

NACBA agrees with the Debtor-Respondent that *certiorari* should be denied because the Bankruptcy Code plainly allows debtors to void mortgage liens that are unsupported by value in the underlying collateral. NACBA also submits that prudential considerations weigh against granting review in this case.

Here, Petitioner stipulated to judgment against it throughout the lower court proceedings. Assuming that Petitioner retains its appellate rights, the lack of any rulings on the merits by the lower courts makes this case an inappropriate vehicle for review. Additionally, more fully developed cases are pending at the Eleventh Circuit Court of Appeals. Among these is *McNeal v. GMAC Mortgage,* L.L.C., 735 F.3d 1263 (11th Cir. 2012), which served as the basis for the stipulated judgments in this case. In *McNeal*, a petition for rehearing *en banc* remains pending. Granting review in this case, in which Petitioner has "fast-tracked" its appeal by stipulating to judgment, will cut short the court of appeals' deliberative process that ultimately will either eliminate any conflict

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and letters of consent accompany the brief.

among the circuit courts of appeals or provide this Court with a more appropriate vehicle for review.

ARGUMENT

I. BECAUSE PETITIONER STIPULATED TO JUDGMENT AND OTHER MORE DEVELOPED CASES INVOLVING THE SAME ISSUE REMAIN PENDING AT THE ELEVENTH CIRCUIT COURT OF APPEALS, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR DECIDING WHETHER SECTION 506(d) OF THE BANKRUPTCY CODE PERMITS A DEBTOR TO ELIMINATE A MORTGAGE LIEN THAT IS UNSUPPORTED BY ANY VALUE IN THE COLLATERAL.

A. Petitioner stipulated to judgment in the bankruptcy court, district court and court of appeals, and therefore this case was never fully briefed or decided on the merits.

It has been said that parties who have consented to the entry of judgment against them waive their right to appellate review, unless they can show facts that would justify nullifying the consent. *See Swift & Co. v. U.S.*, 276 U.S. 311, 323-24 (1928) (summarizing cases). At the bankruptcy court, district court, and court of appeals, Petitioner stipulated to a judgment against it. Pet. App. 5a-9a (bankruptcy court); Pet App. 3a (district court); Pet. App. 1a-2a. The bankruptcy court's stipulated order, which was summarily affirmed by the district court and court of appeals, states that it is "subject to the right of appellate review." Pet. App. 5a, 7a. Several courts of appeals have held that such a reservation of rights avoids waiver and permits an appellate court to review the merits of the case. *See Shores v. Sklar*, 885

F.2d 760, 764 n.7 (11th Cir. 1989) (en banc); *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993); *but see Coughlin v. Regan*, 768 F.2d 468 (1st Cir. 1985) (reservation of appellate rights must be unequivocal and will not be presumed); *Amstar v. Southern Pacific Transport Co.*, 607 F.2d 1100 (5th Cir. 1979) (per curiam) (holding appellate review is unavailable even if the consent judgment purports to reserve rights of appeal), *cert. denied*, 449 U.S. 924 (1980). However, this case is an inappropriate vehicle for review, even assuming that the Petitioner retains its appellate rights and that this Court may review the question presented on its merits. *See Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261, 266 (1985) ("a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.")

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). Here, because Petitioner stipulated to judgment in all the lower courts, the issue presented was never fully briefed on the merits at any level. Instead the court of appeals summarily affirmed the district court's decision, which in turn, summarily affirmed the Petitioner's appeal of a stipulated order from the bankruptcy court on Sinkfield's motion seeking to void a junior mortgage lien on his home. In this case the Court would be proceeding without the benefit of rulings on the merits by the lower courts.

Further, by stipulating to judgment in the courts below, Petitioner seeks to "jump the queue" and circumvent the normal appellate process. Having "fast-

tracked" its case through the appellate process, Petitioner now effectively asks this Court to review a decision of the Eleventh Circuit Court of Appeals—*McNeal v. GMAC Mortgage, L.L.C.*, 735 F.3d 1263 (11th Cir. 2012)—that is still subject to further review, as discussed below. For this reason, it would be inappropriate to grant review in this case.

B. Other More Developed Cases on the Same Issue Are Pending in the Court of Appeals for the Eleventh Circuit.

The basis for summary affirmance in this case is the binding authority of the Eleventh Circuit Court of Appeals decision in *McNeal v. GMAC Mortgage, L.L.C.*, 735 F.3d 1263 (11th Cir. 2012). In contrast to this case, *McNeal* was fully briefed and decided on the merits at the court of appeals. Presently, a petition for rehearing *en banc* remains pending in the *McNeal* case.[2]

Additionally, another case on the same issue is pending before the Eleventh Circuit Court of Appeals—*Wilmington Trust, N.A. v. Malone*, Docket No. 13-13688 (11th Cir.). The *Malone* case was fully briefed in the Eleventh Circuit case as of October 29, 2013. In addition, Appellant has filed a motion for

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[2] Proceedings in *McNeal* were stayed by the court of appeals after the Appellee, GMAC Mortgage, LLC, and certain affiliates, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. *McNeal v. GMAC Mortgage, LLC*, Docket No. 11-11352, Order Staying the Proceedings (11th Cir. Feb. 22, 2013), Appendix A. Subsequently, the court of appeals has acknowledged that the stay is no longer in effect, and that it may proceed with the appeal with the current parties. *Id.*, Order (11th Cir. Aug. 2, 2013), Appendix B.

initial hearing *en banc*, which remains pending. *Malone*, Docket No. 13-13688, Motion (11th Cir. Oct. 29, 2013). *Malone* arrived at the Eleventh Circuit on direct appeal from the bankruptcy court. *See Wilmington Trust, N.A. v. Malone*, Docket No. 13-90013, Order Granting Petition for Direct Appeal (11th Cir. Aug. 16, 2013), Appendix C. While the *Malone* case does not have the benefit of an intermediate appeal to the district court, the bankruptcy court did issue a lengthy opinion on the merits of the case. *In re Malone*, 489 B.R. 275 (Bankr. N.D. Ga. 2013).

By stipulating to judgment based on the binding precedent of *McNeal*, and seeking review of that stipulated judgment, Petitioner attacks *McNeal* even though it remains subject to review. Petitioner has short-circuited the appellate process leaping ahead of two cases that have been more fully developed, and both of which are seeking *en banc* review. Given the procedural posture of these two other cases—*McNeal* and *Malone*—it would be awkward to grant review in this case. This Court should not deprive the Eleventh Circuit Court of Appeals of the right to fully consider its opinions before they are reviewed. The court of appeals could opt to hear either of the pending cases *en banc* and either eliminate any conflict among the circuit courts of appeals or provide this Court with a more appropriate vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TARA TWOMEY
Counsel of Record
NATIONAL CONSUMER
BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256
ttwomey@me.com

Dated: February 28, 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 11-11352
NON-ARGUMENT CALENDAR
FILED: FEBRUARY 22, 2013

D.C. DOCKET NOS. 1:10-CV-01612-TCB; 09-BKC-78173-PWB

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,

versus

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, A GMAC COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

ORDER:

In this appeal, Lorraine McNeal challenged the district court's affirmance of the bankruptcy court's denial of her motion to "strip off a wholly unsecured second-priority lien on her home. After we announced a decision and opinion reversing the district court's decision and remanding for additional proceedings, Appellees GMAC Mortgage, LLC and Homecomings Financial, LLC filed voluntary petitions for Chapter 11 bankruptcy.

Subject to exceptions not applicable here, the filing of a bankruptcy petition operates as an automatic stay of the "continuation . . . o f a judicial, administrative, or other action or proceeding against the debtor that was . . . commenced before" the bankruptcy petition was filed. 11 U.S.C. § 362(a)(1). This law means that "all proceedings against the debtor or debtor's property are stayed during the pendency of the bankruptcy proceedings." *Carver v. Carver*, 954 F.2d 1573, 1576 (11th Cir.1992) (emphasis in original). So, this case must stand still for a while, and we will not rule on motions or substitutions of parties while the stay exists.

It is therefore confirmed and ORDERED that, pursuant to 11 U.S.C. § 362, all proceedings in this appeal are stayed. The parties are directed to inform the court when the bankruptcy court either grants relief from the automatic stay under section 362(d) or when the automatic stay expires.

/*S*/ J.L. EDMONDSON
HON. JAMES LARRY EDMONDSON
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 11-11352
NON-ARGUMENT CALENDAR
FILED: FEBRUARY 22, 2013

D.C. DOCKET NOS. 1:10-CV-01612-TCB; 09-BKC-78173-PWB

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,

versus

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, A GMAC COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

BEFORE CARNES, Chief Judge, TJOFLAT, and EDMONDSON, Circuit Judges

ORDER:

Briefly stated, Lorraine McNeal challenges the district court's affirmance of the bankruptcy court's denial of her motion to "strip off" a wholly unsecured second-priority lien on her home. This appeal was stayed automatically under 11 U.S.C. § 362 when Defendant-Appellees filed their own petitions for Chapter 11 bankruptcy. The bankruptcy court presiding over Defendants-Appellees' bankruptcy proceedings has now entered a "Stipulation and Order" lifting expressly the automatic stay for purposes of continuing this appeal to a final resolution. Thus, we now decide some outstanding matters.

McNeal has filed a "Motion for Reconsideration" information this Court of the bankruptcy court's "Stipulation and Order" and seeking a determination that this appeal is no longer stayed. Because McNeal does not seek reconsideration of an earlier order from this Court and because the bankruptcy court has already lifted the automatic stay, we DISMISS McNeal's motion as unnecessary. We do acknowledge, however, that the automatic stay has been lifted and that we may proceed with this appeal.

After Defendants-Appellees filed for bankruptcy, we ordered the parties to show cause why the Court should not reconsider sua sponte its denial of McNeal's motion to substitute Defendants-Appellees' transferees as parties to this appeal. Because this appeal is no longer subject to an automatic stay and because neither party supports substituting parties, we will proceed with the current parties to this appeal.

We GRANT McNeal's motion to publish the decisive opinion (date 11 May 2012) in this case.*

*We are aware that Defendants-Appellees' petition for rehearing en banc is still pending. No ruling will be made on that petition for at least 30 days after the date of publication of the opinion in this appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 13-90013-F
FILED: AUGUST 16, 2013

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE OF SACO 1 TRUST 2006-7
Petitioner,

versus

LYNETTE DAIS MALONE,
Respondent.

Petition for Permission to Appeal an Order from the United States Bankruptcy Court for the Northern District of Georgia

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Before: TJOFLAT, WILSON, and PRYOR, Circuit Judges.

BY THE COURT:

The Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1291(b) is GRANTED.