The Chapter 13 Cure Provisions: A Doctrine in Need of a Cure

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Note

The Chapter 13 Cure Provisions: A Doctrine in Need of a Cure

When a homeowner falls behind in her mortgage payments and the mortgagee declares a default, foreclosure proceedings typically begin with the mortgagee accelerating the loan.1 Once accelerated, the entire amount of the mortgage loan, not just the arrearage owed, is due and payable immediately.2 To save the home from the foreclosure selling block, the homeowner must meet the virtually insurmountable task of paying off the entire loan.3

Homeowners facing this predicament often look to Chapter 13 of the federal Bankruptcy Code for assistance.4 The Code affords debtors the right to cure the default — pay off the arrearage — and thereby de-accelerate the mortgage and reinstate the original payment schedule.5 Unfortunately, due to federal courts’ differing interpretations of relevant Chapter 13 provisions,6 homeowners seeking to save their homes through a Chapter 13 filing may find these Code protections beyond their reach. Many debtors may discover that they have acted too late.

Foreclosure proceeds in stages.7 After acceleration of the

2. Id. § 7.6, at 488.
3. Id. § 7.6, at 489.
4. As one court noted, “the bottom line of most Chapter 13 cases is to preserve and avoid foreclosure of the family house.” In re Thacker, 6 Bankr. 861, 865 (Bankr. W.D. Va. 1980).
5. See In re Roach, 824 F.2d 1370, 1377 (3d Cir. 1987) (holding that Chapter 13 debtors can cure default on accelerated mortgage); Downey Sav. & Loan Ass’n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987) (same); Foster Mortgage Corp. v. Terry (In re Terry), 780 F.2d 894, 896 (11th Cir. 1985) (same); Federal Land Bank v. Glenn (In re Glenn), 760 F.2d 1428, 1442 (6th Cir.), cert. denied, 475 U.S. 849 (1985) (same); In re Clark, 738 F.2d 869, 872 (7th Cir. 1984) (same); Grubbs v. Houston First Am. Sav. Ass’n, 730 F.2d 236, 237 (5th Cir. 1984) (en banc) (same); Di Pierro v. Taddeo (In re Taddeo), 685 F.2d 24, 26 (2d Cir. 1982) (same).
6. See infra notes 39-78 and accompanying text.
7. Foreclosure can be conducted judicially, G. NELSON & D. WHITMAN,
loan, the mortgagee obtains a state court judgment of foreclosure. If this judgment debt is not satisfied, the home is sold at a foreclosure sale. Federal appellate courts hold that a debtor can exercise the Chapter 13 cure provisions even though the mortgagee accelerated the mortgage before the Chapter 13 filing. The federal circuit courts disagree, however, whether the same right to de-accelerate is available if the mortgagee accelerated the loan and obtained a state court foreclosure judgment before the Chapter 13 debtor filed for bankruptcy. Essentially, the courts disagree whether a post-judgment filing comes too late to save the family home.

This Note examines whether Chapter 13 permits a debtor to cure a mortgage default after the mortgagee obtains a pre-petition foreclosure judgment. Part I sets forth the Chapter 13 cure provisions and reviews the legislative history of their enactment. Part II discusses the reasoning and holdings of the lead cases considering the effect of a pre-petition foreclosure judgment on the debtor’s right to cure. Part III critiques these decisions, focusing on the analytical problems inherent in each court’s approach. The Note finds each circuit’s approach imperfect, and concludes that Chapter 13 should be interpreted to provide for a right to cure even after entry of a state court foreclosure judgment.

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supra note 1, § 7.11, at 505, or independent of the courts through a power-of-sale clause in the mortgage agreement. Id. § 7.19, at 534. Judicial foreclosure is permitted in every state, id. § 7.11, at 505-06, whereas power-of-sale foreclosures are permitted in only half the states. Id. § 7.19, at 534. For purposes of this Note, “foreclosure” will refer to judicial foreclosure.

8. See id. § 7.11, at 506.

9. See id. Judgment and sale are just the highlights. Judicial foreclosure actually is a time-consuming and elaborate procedure:

A typical action in equity to foreclose and sell involves a long series of steps: a preliminary title search to determine all parties in interest; filing of the foreclosure bill of complaint and lis pendens notice; service of process; a hearing, usually by a master in chancery who then reports to the court; the decree or judgment; notice of sale; actual sale and issuance of certificate of sale; report of the sale; proceedings for determination of the right to any surplus; possible redemptions from foreclosure sale; and the entry of a decree for a deficiency.

Id.

10. See cases cited supra note 5.

I. THE CHAPTER 13 CURE PROVISIONS

Chapter 13 of the Bankruptcy Code\textsuperscript{12} authorizes adjustment of debts of individuals with regular income.\textsuperscript{13} On filing a Chapter 13 petition, a debtor falls within the protection of the statutory "automatic stay," which temporarily blocks all entities from taking action against the debtor or the debtor's property.\textsuperscript{14} While behind the automatic stay's protective shield, the debtor must propose a "plan" that explains how she intends to address her outstanding obligations.\textsuperscript{15} Under section 1322(b)(2),

\begin{itemize}
\item \textsuperscript{12} 11 U.S.C. §§ 1301-1330 (1988).
\item \textsuperscript{13} Chapter 13 is an alternative to Chapter 7, 11 U.S.C. §§ 1101-1174 (1988), which provides for the liquidation of the debtor's assets. Chapter 13 is limited to individuals with unsecured indebtedness of no more than $100,000 and secured indebtedness of no more than $350,000. 11 U.S.C. § 109(e) (1988).
\item Chapter 12 of the Code, modeled after Chapter 13, provides analogous relief to family farmers. 11 U.S.C. §§ 1201-1231 (1988). Chapter 12 was enacted in 1986 in response to growing concern that neither Chapter 13 nor Chapter 11, 11 U.S.C. §§ 1101-1174 (1988) (business reorganization), afforded effective relief to family farmers facing bankruptcy. See H.R. CONF. REP. No. 958, 99th Cong., 2d Sess. 48, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5246, 5249 (noting most family farmers have too much debt to qualify under Chapter 13 and many have found Chapter 11 needlessly complicated, unduly time-consuming, inordinately expensive and unworkable).
\item \textsuperscript{14} Section 362(a) provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of:
\begin{enumerate}
\item the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
\item the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.
\end{enumerate}
\end{itemize}


The automatic stay is one of the fundamental debtor protections under the Bankruptcy Code. "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." S. REP. NO. 989, 95th Cong., 2d Sess. 54-55, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5840-41; see also In re Fitch, 102 Bankr. 139, 140 (Bankr. N.D. Ill. 1989) (stating that section 362 "bars any action affecting the Debtor's interest from the time of filing") (emphasis added); 4 COLLIER ON BANKRUPTCY ¶ 362.01, at 362-67 (14th ed. 1978) (noting that the automatic stay provides for "a broad stay of litigation, lien enforcement, and other actions, judicial or otherwise, which would affect or interfere with property of the estate").

\begin{itemize}
\item \textsuperscript{15} The Code merely states "[t]he debtor shall file a plan." 11 U.S.C. § 1321 (1988). Absent a showing of cause, the plan must be filed within 15 days of the filing of the petition. BANKR. R. 3015.
\end{itemize}
the plan may "modify" secured claims, except those secured by a security interest in the debtor's residence. Under section 1322(b)(5), the debtor's plan can "cure" any default within a reasonable time on any long-term claims.

Congress enacted sections 1322(b)(2) and 1322(b)(5) as part of the 1978 overhaul of the federal bankruptcy system. Previously, Congress had created the Commission on the Bankruptcy Laws of the United States to study the bankruptcy laws and recommend avenues for reform. Given Congress's con-

(a) The plan shall—
(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.


16. Section 1322(b)(2) provides that the plan may "modify the rights of holders of secured claims other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims." 11 U.S.C. § 1322(b)(2) (1988).

The Code does not define "modify." As used in § 1322(b)(2), modify indicates a change in the terms of the obligation, such as a reduction in the amount of payments or a reduction of the amount owed. Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 245 (5th Cir. 1984) (en banc). In contrast, to "cure" simply means to remit the arrearage owed to the creditor. Id. at 244.

The Code broadly defines "claim" as a "right to payment, whether or not reduced to judgment." 11 U.S.C. § 101(4)(A) (1988). "Security interest" is defined as a "lien created by an agreement." Id. at § 101(45). "Lien," in turn, is defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation." Id. at § 101(33).

17. Section 1322(b)(5) provides that the plan may —
(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.


cern about the growing number of consumer bankruptcies, the Commission focused considerable attention on the adequacy of Chapter XIII, one of the Code chapters governing consumer, or personal, bankruptcy.

The Commission identified a number of inadequacies in Chapter XIII, including the Code's treatment of secured claims. Before 1978, court approval of a debtor's Chapter XIII plan required the written consent of all secured creditors whose claims were affected by the plan. Depending on how a particular bankruptcy court applied this provision, secured creditors who objected to a proposed modification of their claims could veto debtors' efforts to emerge from bankruptcy. Even when the outstanding obligation exceeded the value of the creditor's security, some courts held that the secured creditor could block the debtor's Chapter XIII plan unless the creditor's claim was fully satisfied.

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20. In fiscal year 1946, there were 10,196 bankruptcy filings, a 40-year low. Commission Report, supra note 19, at 2. By fiscal year 1967 this number had reached 208,329 filings, of which 191,729 were consumer, or nonbusiness, filings. Id. During this period, consumer bankruptcies as a percentage of total bankruptcies increased from 84% to 92%. Id.


22. See generally Commission Report, supra note 19, at 165 (citing § 652(1) of the former Bankruptcy Act, ch. 575, § 652(1), 52 Stat. 840, 934 (1938), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2549). A creditor was deemed "affected" by the debtor's plan if his interest was "materially and adversely affected thereby." Bankruptcy Act, ch. 575, § 607, 52 Stat. 840, 931 (1938), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 § 101, 92 Stat. 2549, 2549. In practice, the criterion was whether the secured creditor was being "dealt with in the plan;" if so, the creditor was "affected." 10 Collier on Bankruptcy ¶ 22.10, at 49 (14th ed. 1978).


25. The House Judiciary Committee Report accompanying the Bankruptcy Reform Act of 1978 described the secured creditor veto problem this way:

Most often in a consumer case, a secured creditor has a security interest in property that is virtually worthless to anyone but the debtor. The creditor obtains a security interest in all the debtor's furniture, clothes, cooking utensils, and other personal effects. These items
The former Bankruptcy Act also precluded the debtor from dealing with claims secured by real property in her Chapter XIII plan. Thus, although the debtor often was required to make installment payments on a real estate mortgage or contract for the purchase of her home, the plan could not address that obligation. The home mortgage, often a Chapter XIII debtor's principal indebtedness, was excluded from a Chapter XIII proceeding.

The Commission's recommendations provided the basis for sections 1322(b)(2) and 1322(b)(5) of the current Bankruptcy Code. To eliminate the secured creditor veto, the Commission proposed that the debtor be allowed to alter or modify claims secured by personal property. Along with other recommendations, this reform would enable the debtor to reduce the secured claim to the actual value of the collateral.

have little or no resale value. They do, however, have a high replacement cost. The mere threat of repossession operates as pressure on the debtor to pay the secured creditor more than he would receive were he actually to repossess and sell the goods.

Courts often escaped the harshness of the rule by allowing the debtor to delete from her plan any reference to the secured claim, thus obviating the need to gain the consent of the secured creditor. COMMISSION REPORT, supra note 19, at 165. Courts protected the debtor from this creditor by invoking their broad injunctive powers to enjoin the creditor from repossessing the collateral. Id. at 165-66.

26. Section 606(1) of the former Bankruptcy Act defined "claim," for the purposes of Chapter XIII, as including "all claims of whatever character against the debtor or his property, . . . whether secured or unsecured, liquidated or unliquidated, fixed or contingent, but shall not include claims secured by estates in real property or chattels real." Bankruptcy Act, ch. 575, § 606(1), 52 Stat. 840, 930 (1938), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2549 (emphasis added).

27. The Commission recommended that the debtor's plan be allowed to "include provisions dealing with claims secured by personal property severally, on any terms, and may provide for the curing of defaults within a reasonable time and otherwise alter or modify the rights of the holders of such claims." REPORT OF THE COMM'N. ON THE BANKR. LAWS OF THE U.S., H.R. DOC. No. 137, 93d Cong., 1st Sess., pt. 2, at 204 (1973) [hereinafter COMMISSION REPORT, pt. 2].

28. The House Committee report explained:

The bill requires the court to value the secured creditor's interest. To the extent of the value of the security interest, he is treated as having a secured claim, entitled to be paid in full under the plan . . . . To the extent that his claim against the debtor exceeds the value of his collateral, he is treated as having an unsecured claim, and he will receive payment along with all other general unsecured creditors. . . . This is an important departure from a few misguided decisions under current law, under which a secured creditor with a $2000 secured [sic] by
Commission suggested a more limited reform for mortgage loans. Although the debtor's plan could not modify or alter the mortgage obligation, the plan could provide for the curing of defaults and the maintenance of mortgage payments.\footnote{30}

\begin{itemize}
  \item The household goods worth only $200 is entitled in some cases to his full $2000 claim, in preference to all unsecured creditors. H.R. REP. No. 595, 95th Cong., 1st Sess. 124, \textit{reprinted in} 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6085.

30. The Commission proposed that the Chapter 13 plan "may include provisions for the curing of defaults within a reasonable time and the maintenance of payments while the case is pending on claims secured by a lien on the debtor's residence." COMMISSION REPORT, pt. 2, supra note 28, at 204. This new "limited authority," the Commission noted, "does not authorize reduction of the size or varying of the time of installment payments." \textit{Id.} at 205-06.

Some courts had, under the old Code, permitted Chapter XIII debtors to cure past defaults and maintain their mortgage payments. These courts did so, however, through their broad injunctive power to protect the debtor's property. \textit{See} Bankruptcy Act, ch. 575, § 614, 52 Stat. 840, 931 (1938), \textit{repealed by} Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 105, 92 Stat. 2549, 2555 (stating that "[t]he court may . . . enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor").

In \textit{In re} Cassidy, 401 F. Supp. 757 (E.D.N.Y. 1975), the court outlined the relevant factors for determining whether creditors should be enjoined from foreclosing on their security: the debtor is acting in good faith and the plan is feasible; the stay is necessary to preserve the debtor's estate or the debtor's ability to execute the plan; and the injunction "should not impair the secured creditor's security and should be conditioned on the curing of delinquent amounts due the secured creditor within a reasonably short period." \textit{Id.} at 758-59. \textit{See}, e.g., Hallenback v. Penn Mut. Life Ins. Co., 323 F.2d 566, 572 (4th Cir. 1963) (holding that the bankruptcy referee, in the exercise of sound discretion, may enjoin foreclosure on the debtor's home despite the fact that a Chapter XIII plan cannot deal with the mortgage debt); \textit{In re} Pizzolato, 281 F. Supp. 111-12 (W.D. Ark. 1967) (enjoining foreclosure and holding that debtor could cure defaults when claim held by nonconsenting secured creditor "is not materially and adversely affected"); \textit{In re} Garrett, 203 F. Supp. 459, 460 (N.D. Ala. 1962) (approving of injunction against mortgage foreclosure and the maintenance of regular mortgage payments, when debtor cured defaults at time of plan's confirmation and debtor's equity in home was greater than the outstanding mortgage debt).

The Commission endorsed the result of these cases and thus sought to codify it as part of the statutory protections available to the Chapter 13 debtor. \textit{See} COMMISSION REPORT, supra note 19, at 13 (noting that "courts have frequently enjoined foreclosure of real estate mortgages and contracts during the pendency of a Chapter XIII case and have in other ways recognized the need of a Chapter XIII petitioner for protection of his right to keep his equity in his home during his performance of the terms of a Chapter XIII plan"); \textit{see also} United Cos. Fin. Corp. v. Brantley, 6 Bankr. 178, 190 (Bankr. N.D. Fla. 1980) (stating that "section 1322(b)(5) is a statutory codification of the practice developed under former Chapters XI and XIII wherein the injunctive power . . . was sometimes utilized not to modify the rights of a creditor but to postpone his remedies upon reasonable and equitable terms and conditions in aid of a worthy rehabilitation plan.") (citations omitted).
The House and Senate redrafted and amended these recommendations, although ultimately sections 1322(b)(2) and 1322(b)(5) continued to reflect the Commission's proposals. Unfortunately, neither the Commission nor the Congress addressed the relationship between the cure provisions of section 1322(b)(5) and the various stages of foreclosure. This issue, particularly the effect of a foreclosure judgment on the Chapter 13 right to cure a mortgage default, now divides the federal circuits.

31. In the House bankruptcy reform bill, the modification of secured claims recommended by the Commission was expanded to cover all claims, not just those secured by personal property. Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 243 (5th Cir. 1984) (en banc). The House version thus would have permitted the debtor's modification of a mortgage debt.

This deviation from the Commission's recommendation ran into opposition in the Senate. In Senate hearings, counsel for the Senior Vice-President of the Real Estate Division of Massachusetts Mutual Life Insurance testified on the proposed legislation:

With respect to the savings and loans, in particular, and the future prospects for loans to individuals under the proposed bills, there is really only one basic problem. That is, the provision in both bills that provides for modification of the right of the secured creditor on residential mortgages, a provision that is not contained in present law.

[S]avings and loans will continue to make loans to individual homeowners, but they will tend to be, I believe, extraordinarily conservative and more conservative than they are now in the flow of credit.

It seems to me they will have to recognize that there is an additional business risk presented by either or both of these two bills if the Congress enacts chapter XIII in the form proposed, thus providing for the possibility of modification of the rights of the secured creditor in the residential mortgage area.


In response to concerns that the House version would reduce the flow of lending capital to the home mortgage market, the Senate amended the proposed § 1322(b)(2) to prevent any modification of claims secured by real estate. Grubbs, 730 F.2d at 245. Floor amendments in both houses narrowed this language to exempt from modification only those claims secured by real property which is the debtor's principal residence. Id. at 246. See supra note 16 and accompanying text.

32. See supra notes 16-17 and accompanying text.

33. See In re Glenn, 760 F.2d 1428, 1435 (6th Cir. 1985) (stating that "[w]e wish Congress had spoken its specific intent more clearly with respect to cases involving acceleration, judgments, or sales").
II. INTERPRETING THE CHAPTER 13 CURE PROVISIONS

A. *In re Taddeo: The Second Circuit Sets the Stage*

The Second Circuit was the first federal appellate court to interpret sections 1322(b)(2) and 1322(b)(5). In *In re Taddeo*, the court held that section 1322(b)(5) allows Chapter 13 debtors to cure a mortgage default even though the mortgagee accelerated the mortgage before the Chapter 13 petition was filed.

The homeowners in *Taddeo* defaulted on their mortgage. *Id.* at 25. The mortgagee accelerated and commenced foreclosure proceedings, but before the mortgagee obtained a final judgment of foreclosure, the homeowners filed under Chapter 13. *Id.* at 26.

The homeowners proposed to cure the default by paying off the arrearage during the life of the Chapter 13 plan. *Id.* at 26. The mortgagee objected and petitioned the court for relief from the automatic stay so that she could proceed with foreclosure. The Bankruptcy Court rejected the mortgagee’s petition. *Id.*

The mortgagee’s primary argument before the Second Circuit was that the debtors could not invoke § 1322(b)(5) to cure the payment default and restate the mortgage because subdivision (5) only permits debtors to cure secured claims when the “last payment is due after the last payment under the plan is due.” *Id.* at 28. As the mortgage had been accelerated and was therefore payable in full immediately, the mortgagee argued that the claim no longer was one in which the last payment was due after the scheduled termination of the plan. *Id.* Allowing cure after acceleration, the mortgagee argued, would “modify” her rights as a holder of a claim secured by the debtor’s residence, a direct violation of section 1322(b)(2). *Id.*

The Second Circuit rejected this argument on two grounds. First, the court held that “the power to cure must comprehend the power to ’de-accelerate.’” *Id.* at 26. The court reasoned that “[a] default is an event in the debtor-creditor relationship that triggers certain consequences — here, acceleration” and that “[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions.” *Id.* at 26-27. The Second Circuit stated that policy considerations support this construction of the statute:

Conditioning a debtor’s right to cure on its having filed a Chapter 13 petition prior to acceleration would prompt unseemly and wasteful races to the courthouse. Worse, these would be races in which mortgagees possess an unwarranted and likely insurmountable advantage: wage earners seldom will possess the sophistication in bankruptcy matters that financial institutions do, and often will not have retained counsel in time for counsel to do much good. In contrast, permitting debtors in the Taddeos’ position to de-accelerate by payment of the arrearages will encourage parties to negotiate in good faith rather than having to fear that the mortgagee will tip the balance irrevocably by accelerating or that the debtor may prevent or at least long postpone this by filing a Chapter 13 petition. *Id.* at 27.

Second, the court reasoned that the ban on modifying home mortgages in § 1322(b) did not limit the debtor’s power to cure under § 1322(b)(5), see supra notes 16 and 17, because “we do not read ‘curing defaults’ under (b)(3) or ‘cure-
Despite criticism of the Taddeo court's statutory analysis,\textsuperscript{36} federal appellate courts uniformly agree that a Chapter 13 debtor can cure a mortgage default even though the debt was accelerated before the Chapter 13 filing.\textsuperscript{37} The federal circuits differ, however, as to the applicability of section 1322(b) where the debtor files for bankruptcy after a state court enters a judgment of foreclosure.\textsuperscript{38}

B. THE SEVENTH CIRCUIT: FOCUS ON TITLE THEORY

The Seventh Circuit addressed the effect of a pre-petition foreclosure judgment on the debtor's right to cure under section 1322(b) in \textit{In re Clark}.\textsuperscript{39} In Clark, debtor homeowners filed for Chapter 13 protection after entry of a foreclosure judgment but before the foreclosure sale.\textsuperscript{40} The mortgagee objected to the Clarks' Chapter 13 plan\textsuperscript{41} on the ground that the cure provisions of section 1322(b) were unavailable once a state court

\begin{footnotesize}
\begin{itemize}
\item See supra note 5. The Taddeo result also has found support among commentators. See Comment, \textit{Home Foreclosures Under Chapter 13 of the Bankruptcy Reform Act}, supra note 17, at 664-65 (arguing that Chapter 13 debtors should be permitted to cure defaults despite acceleration of the mortgage); Comment, \textit{Bankruptcy—Mortgages—Despite Pre-Bankruptcy Acceleration of a Mortgage Under State Law, A Debtor Can Cure Default and Reinstate the Original Payment Schedule Under Chapter 13 of the Bankruptcy Code}, 52 U. CIN. L. REV. 195, 205-06 (1983) (noting that the Taddeo court made a fair and accurate assimilation of the statutory language and relevant policy considerations); Comment, \textit{Chapter 13 Bankruptcy: When May a Mortgage Debtor Cure the Accelerated Mortgage Debt Using Section 1322(b)(5)\textsuperscript{?}}, 8 U. DAYTON L. REV. 109, 132 (1982) (arguing that § 1322(5) may be used to cure a mortgage default even if the mortgage is accelerated).
\item See infra notes 39-78 and accompanying text.
\item Id. at 870. Hugh and Joanne Clark financed the purchase of their home by a mortgage with the Federal Land Bank of St. Paul. The Clarks used the home until the winter of 1981-82, when they abandoned the house due to water damage from frozen pipes. On September 3, 1981, the Bank commenced judicial foreclosure proceedings. When the Clarks did not respond to the foreclosure complaint, the state court entered a judgment of foreclosure on February 2, 1982. The Clarks filed for bankruptcy under Chapter 13 on May 27, 1982, before the scheduled foreclosure sale. Id.
\item The Clarks proposed to cure the arrearage over the 36 month life of their Chapter 13 plan. Id.
\end{itemize}
\end{footnotesize}
entered a foreclosure judgment.\textsuperscript{42}

The Clark court looked to applicable state law to determine the effect of a foreclosure judgment.\textsuperscript{43} In particular, the Seventh Circuit considered whether the foreclosure judgment transferred legal and equitable title from the mortgagor to the mortgagee. If the judgment passed title, the court reasoned, the property no longer could be considered part of the bankruptcy estate\textsuperscript{44} and within the protection of the automatic stay.\textsuperscript{45}

The Seventh Circuit determined that a Wisconsin foreclosure judgment did not transfer legal and equitable title to the mortgagee. Wisconsin, the court noted, follows the lien theory of mortgages;\textsuperscript{46} even after a court has entered a foreclosure

\textsuperscript{42} Id. at 871.
\textsuperscript{43} Id.
\textsuperscript{44} Under the Bankruptcy Code, the debtor's filing of a bankruptcy petition creates a "bankruptcy estate." The Code reads, in pertinent part:
(a) The commencement of a case under . . . this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

The Clark court was not the first to address § 1322(b) in terms of the property of the bankruptcy estate. See, e.g., Justice v. Valley Nat'l Bank, 849 F.2d 1078, 1090 (8th Cir. 1988) (Heaney, J., dissenting) (arguing that the right to cure should survive until final divestment of the debtor's interest in the property under state law); Nimai Kumar Ghosh v. Financial Fed. Sav. & Loan Ass'n (In re Nimai Kumar Ghosh), 38 Bankr. 600, 602 (Bankr. E.D.N.Y. 1984) (denying right to cure after foreclosure sale because all legal and equitable rights of debtor terminated at foreclosure sale under New York State law); Thompson v. Great Lakes Fed. Sav. & Loan Ass'n (In re Thompson), 17 Bankr. 748, 751 (Bankr. W.D. Mich. 1982) (holding that right to cure survives until state law terminates debtor's interest in the property); First Sav. & Loan Ass'n v. Bennett (In re Bennett), 29 Bankr. 380, 381 (W.D. Mich. 1981) (holding that Chapter 13 debtor can cure default as long as debtor retains an interest in the home at the time the petition is filed); In re Butchman, 4 Bankr. 379, 380 (Bankr. S.D.N.Y. 1980) (same).

\textsuperscript{45} See supra note 14.

In lien theory states, the mortgagor has legal and equitable title (until foreclosure) and the mortgagee holds a security interest in the mortgaged property. G. Nelson & D. Whitman, supra note 1, § 4.2, at 145-46. Most states follow the lien theory of mortgages. According to a 1965 survey, Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming and possibly Missouri are considered lien theory states. Id. at 145 n.1 (citing Comment, Proposed Changes in Minnesota Mortgage Law, 50 Minn. L. Rev. 331, 339 (1965); Pomeroy, Equity Jurisprudence § 1188 (1941)). Recent statutory changes indicate that Illinois may also
judgment, the mortgagee holds only a lien against the property.\textsuperscript{47} The court distinguished the effect of a foreclosure judgment in Wisconsin\textsuperscript{48} from states in which entry of a foreclosure judgment effectively transfers legal and equitable title to the mortgagee.\textsuperscript{49} Having concluded that the Clarks had legal and equitable title at the time of filing, and that their home was included in the bankruptcy estate, the \textit{Clark} court then considered whether the debtors could exercise the statutory right to cure. Following the reasoning of \textit{Taddeo}, the court held that the debtors could cure the mortgage default.\textsuperscript{50}

The Seventh Circuit concluded that the right to cure survives a foreclosure judgment in lien theory states. Although the court did not expressly proclaim the contrary rule — that the right to cure is unavailable after entry of a foreclosure judgment in title theory states — the implication is clear.\textsuperscript{51} Indeed, the bankruptcy courts within the Seventh Circuit have

be a lien theory state. See \textit{In re Josephs}, 85 Bankr. 500, 505 n.6 (Bankr. N.D. Ill.), aff'd, 93 Bankr. 151 (N.D. Ill. 1988).

A minority of states follow the title theory of mortgages. Under the title theory, the mortgagee holds legal title to the mortgaged property as security until the mortgage debt has been paid or foreclosed. G. NELSON & D. WHITMAN, \textit{supra} note 1, § 4.1, at 142. A recent study identified Alabama, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania and Rhode Island as adhering to the title theory of mortgages. Burkhart, \textit{Freening Mortgages of Merger}, 40 VAND. L. REV. 283, 322-24 (1987). There is conflicting authority on whether Pennsylvania follows the lien theory or title theory. \textit{Id.} at 324.

\textit{Clark}, 738 F. 2d at 871.

\textsuperscript{47} \textit{Clark}, 738 F. 2d at 871.

\textsuperscript{48} The court noted that a Wisconsin foreclosure judgment does not destroy the mortgage lien, but merely judicially determines the amount. \textit{Id.}

\textsuperscript{49} \textit{Id.} at 871 n.3.

\textsuperscript{50} \textit{Id.} at 874. The court followed the reasoning of \textit{Taddeo} and Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 245 (5th Cir. 1984) (en banc), a Fifth Circuit decision in accord with \textit{Taddeo}, holding that the cure provisions would be meaningless if the right to cure did not survive acceleration of the mortgage debt. \textit{Clark}, 738 F.2d at 872-74; see also \textit{supra} note 35 (describing the \textit{Taddeo} court's statutory analysis). The \textit{Clark} court recognized that \textit{Grubbs} and \textit{Taddeo} were cases in which the mortgagee had not yet obtained a final judgment of foreclosure but concluded that "in Wisconsin such a judgment adds nothing of consequence as far as § 1322(b) is concerned." \textit{Clark}, 738 F.2d at 874.

\textsuperscript{51} Immediately after noting that Wisconsin law differs from states in which the judgment effectuates a transfer of title, the \textit{Clark} court cited one case with the parenthetical, "Wisconsin follows 'lien' theory of mortgages," and another case with the parenthetical, "mortgagor loses interest in property only after foreclosure sale." \textit{Id.} at 871; see also Sable, \textit{A Chapter 13 Debtor's Right to Cure Default Under Section 1322(b): A Problem of Interpretation}, 57 AM. BANKR. L.J. 127, 131 (1983) (noting that whether a state follows the title theory or the lien theory of mortgages is dispositive of the applicability of the Chapter 13 cure provisions).
interpreted Clark as drawing this distinction between lien and title theory states.52

C. THE THIRD CIRCUIT: A CONTRACTUAL APPROACH

Debtor homeowners filed a Chapter 13 petition during the statutory redemption period following foreclosure sale in In re Roach.53 The Third Circuit considered whether the right to cure survives the pre-petition judgment of foreclosure.54 Unlike the Clark court, the Third Circuit focused on the mortgage debt rather than on the judgment’s impact on the debtors’ interest in the property.55

After a general discussion of the relationship between state and federal law in the context of bankruptcy,56 the Roach court

52. In In re Schnupp, 64 Bankr. 763 (Bankr. N.D. Ill. 1986), a case arising under Illinois law, the bankruptcy court held that the debtors could cure the default because “[i]n Illinois as in Wisconsin, no title passes upon foreclosure order because both states are ‘lien’ states, not ‘title’ states.” Id. at 767. The court ruled that even if Illinois were a title theory state, state law is preempted by federal law when state law frustrates the policies underlying the Bankruptcy Code. Id. at 768-69. After discussing the broad rehabilitative purposes of Chapter 13, the court concluded that “if Illinois were a title theory state, there would result a conflict between Illinois and federal law.” Id. at 769.

In In re Josephs, 85 Bankr. 500 (Bankr. N.D. Ill.), aff’d, 93 Bankr. 151 (N.D. Ill. 1988), the court discerned from Clark and Goldberg v. Tynan (In re Tynan), 773 F.2d 177 (7th Cir. 1985), another Seventh Circuit Chapter 13 decision, that the right to cure is lost “when the foreclosure process reaches a point at which the pre-foreclosure relationship between the mortgagor and mortgagee has ended, so that it can be said that the mortgagor’s title has effectively been transferred.” Josephs, 85 Bankr. at 504. The court concluded that in Illinois, as in Wisconsin, the mortgagee retains only a lien on the mortgaged property, regardless of whether the mortgage document purports to grant the mortgagee legal title to the property. Id. at 505-06.

In In re Demoff, 90 Bankr. 391 (Bankr. N.D. Ind. 1988), a case arising under Indiana law, the court made a lengthy comparison between Wisconsin and Indiana law, including the point that both states are lien theory states and not title theory states. Id. at 397-98.

53. 824 F.2d 1370 (3d Cir. 1987) (en banc). Benny and Edith Roach’s home was subject to a mortgage held by GMAC Mortgage Company. Id. at 1371. The Roaches fell behind on their mortgage payments. GMAC declared a default, accelerated the mortgage and subsequently obtained a foreclosure judgment. The property was sold to a third party at a sheriff’s sale. Under New Jersey law, after a foreclosure sale the sheriff must “deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served upon him within 10 days after the sale.” The Roaches filed a Chapter 13 petition within the 10 day period. Id.

54. Id. at 1377.

55. Id.

56. The court began with the basic premise that absent a conflict between state property and federal bankruptcy law, state law governs questions of
held that the right to cure did not survive a pre-petition foreclosure judgment. The court reasoned that section 1322(b)(5), which allows a Chapter 13 debtor to cure a default on a long-term secured claim, authorizes curing of defaults in a "contractual relationship." Yet in New Jersey, once the state court enters a foreclosure judgment, the mortgage merges into the judgment and ceases to exist under state law. Thus, there no longer is a contractual relationship between the debtor and the mortgagee. There is nothing left to cure.

After determining the applicable state law, the Roach court examined the Bankruptcy Code for possible reasons to preempt state law and set aside the foreclosure judgment. The court could not find any support for preemption in the statutory language because "cure" and "default" have no meaning with re-

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property rights. Id. at 1373 (citing Johnson v. First Nat'l Bank, 719 F.2d 270, 273 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984)). The Third Circuit quoted at length from the lead Supreme Court case on the relationship between bankruptcy and state property law:

"[P]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"

Id. at 1374 (quoting Butner v. United States, 440 U.S. 48, 54 (1979) (citation omitted)). The court concluded with the proposition that "absent a countervailing interest, 'the basic federal rule is that state law governs.'" Id. (quoting Butner, 440 U.S. at 57).

57. Id. at 1377.
58. See supra note 17 (text of § 1322(b)(5)).
59. Roach, 824 F.2d at 1377 (emphasis added).
60. The doctrine of merger provides that once a plaintiff receives a judgment on a claim, the plaintiff is barred from any future action on that claim. Restatement (Second) of Judgments § 18, at 151-52 (1982). "[T]he original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be 'merged' in the original judgment." Id., comment a.

The Roach court was not the first to apply the doctrine of merger to preclude a Chapter 13 debtor from curing a mortgage default subsequent to the entry of a pre-petition foreclosure judgment. See, e.g., In re Martinez, 73 Bankr. 300, 303-04 (Bankr. D. N.J. 1987); In re Akins, 55 Bankr. 183, 185 (Bankr. M.D. Fla. 1985); First Fin. Sav. & Loan Ass'n v. Winkler, 29 Bankr. 771, 773 (N.D. Ill. 1983); In re Maiorino, 15 Bankr. 254, 258 (Bankr. D. Conn. 1981); In re Jenkins, 14 Bankr. 748, 750 (Bankr. N.D. Ill. 1981); In re Canady, 9 Bankr. 428, 430 (Bankr. D. Conn. 1981).

61. Roach, 824 F. 2d at 1377.
62. Id. at 1378.
gard to judgments. Nor could it find such authority in the legislative history of the bankruptcy code. The court ultimately turned to policy considerations, but again found little to justify extending the opportunity to cure beyond the foreclosure judgment. The Roach court held that the "minimal aid" provided by extending the debtor's right to cure was outweighed by the "uncertainties in the application of state property law and the clouding of real estate titles" that would result from upsetting foreclosure judgments.

D. THE SIXTH CIRCUIT: A UNIFORM RULE

The Sixth Circuit addressed the appropriate limit on the statutory right to cure in In re Glenn. In Glenn, homeowners failed to make several mortgage payments, and the mortgagee accelerated the loan. The debtors filed a Chapter 13 bankruptcy petition several hours after a state court entered a foreclosure judgment.

The Sixth Circuit first reviewed the legislative history of the Chapter 13 cure provisions. The court found that in revising Chapter 13 Congress had two competing concerns in mind.

63. Id.
64. The Third Circuit noted that legislative history did not indicate whether the cure provisions of § 1322(b) were intended to override state court judgments. The court concluded that Congress would have explicitly addressed preemption of state court judgments if it had intended such a result:

If Congress had intended to grant such authority [to set aside state court judgments], we think its sensitivity to considerations of comity would have resulted in some explanation of the necessity for the intrusion on state sovereignty. In the absence of any such explanation, we can only conclude that Congress did not see cures of mortgage defaults as any threat to the integrity of state court judgments.

65. As New Jersey law gives the mortgagor 20 days to file an answer to a complaint in a judicial foreclosure proceeding, the court reasoned that a debtor has ample time to seek legal counsel — and, if necessary, file a Chapter 13 petition — before a final foreclosure judgment is returned. Id.
66. Id.; accord Comment, Accelerated Mortgages: An Unsolved Problem of Interpretation in Chapter 13, 19 HOUS. L. REV. 951, 972-79 (1982) (endorsing line of cases that look to the presence of state court action to determine the applicability of § 1322(b)(5)).
67. Federal Land Bank v. Glenn (In re Glenn), 760 F.2d 1428 (6th Cir. 1985). The case consolidated three appeals. In one, the Chapter 13 debtors petitioned for bankruptcy after entry of a foreclosure judgment. In the other two, filing occurred after foreclosure sale, but before expiration of the statutory redemption period. Id. at 1429-30.
68. Id. at 1430.
69. Id.
70. Id. at 1432.
On one hand, Congress sought to expand the relief available under Chapter 13 to “encourage consumer debtor rehabilitation.” On the other hand, Congress was concerned that excessive debtor protection in the home mortgage area would reduce the flow of mortgage lending capital. Thus, the cure provisions represented an attempt to strike a balance between these competing concerns.

The *Glenn* court then turned to the specific question of the proper limit on the Chapter 13 cure provisions. Finding that neither the statutory language nor the legislative history indicated whether Congress intended the right to cure to survive until acceleration, judgment, or sale, the Sixth Circuit fashioned a “pragmatic” rule, which, it believed, would work “the least violence to the competing concerns evident in the language.” Based on its analysis of the policies underlying Chapter 13, the court selected foreclosure sale as the cut-off point for exercise of the debtor’s right to cure. The *Glenn* court did

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73. The court viewed the compromise as follows. Section 1322(b)(2) grants debtors the power to modify secured claims. *Glenn*, 760 F.2d at 1434. See *supra* note 16. To protect mortgage lenders, home mortgage loans are expressly excluded from this power to modify. *Glenn*, 760 F.2d at 1434. To avoid undermining the rehabilitative goals of the revised Chapter, however, Congress limited the special protection granted to home mortgage lenders. First, the protection applies to claims secured “only” by a security interest in the debtor’s principle residence, thus excluding loans when the home serves as additional security. *Id.* See *supra* note 16. Second, §§ 1322(b)(3)-(b)(5), both granting the right to cure defaults, do not exempt mortgage loans. *Glenn*, 760 F.2d at 1434. Moreover, the court noted, the § 1322(b)(5) right to cure defaults on long-term claims operates “notwithstanding” the § 1322(b)(2) ban on modifying home mortgage loans. *Id.*

74. *Glenn*, 760 F.2d at 1435. Foreclosure proceeds in stages. See *supra* notes 7-9 and accompanying text.

75. *Id.*

76. *Id.* The court outlined its reasons for selecting foreclosure sale as the proper termination point:

(a) The language of the statute is, to us, plainly a compromise . . . . Picking a date between the two extremes, is likewise a compromise of sorts.

(b) The sale of the mortgaged property is an event that all forms of foreclosure, however denominated, seem to have in common . . . [T]he date of sale is a measurable, identifiable event of importance in the relationship of the parties. It is at the heart of realization of the security.

(c) Although the purchaser at the sale is frequently the security holder itself, the sale introduces a new element—the change of own-
not justify its decision based on state law, concluding that state practice varies so much that any effort to accommodate one state's mortgage law would only create confusion in the next.  

III. THE CURE PROVISIONS OF SECTION 1322: A DOCTRINE IN NEED OF A CURE

The three circuits that have addressed the effect of a foreclosure judgment on the Chapter 13 right to cure have followed markedly different paths. The Seventh Circuit focuses on the debtor's interest in the home at the time she filed for bankruptcy. Under this approach, the right to cure survives until foreclosure sale in lien theory states, but the right to cure is lost at foreclosure judgment in title theory states. The Third Circuit rejects this mortgage theory approach, focusing instead on the contractual relationship between the mortgagee and mortgagor. When the mortgage "merges" into a foreclosure judgment and is extinguished under state law, the debtor loses the right to cure at judgment. The Sixth Circuit eschews the state law approach, holding that the debtor's right to cure a mortgage default survives until foreclosure sale regardless of

ership and, hence, the change of expectations—into the relationship which previously existed.

d) The foreclosure sale normally comes only after considerable notice giving the debtor opportunity to take action by seeking alternative financing or by negotiating to cure the default or by taking advantage of the benefits of Chapter 13 . . . .  
e) Any earlier date meets with the complaint that the rights conferred by the statute upon debtors to cure defaults have been frustrated.

(f) Any later date meets with the objection that it largely obliterates the protection Congress intended for mortgagees of private homes as distinguished from other secured lenders.

g) Any later date also brings with it the very serious danger that bidding at the sale itself . . . will be chilled; potential bidders may be discouraged if they cannot ascertain when, if ever, their interest will become finalized.

Id. at 1435-36.

77. The Glenn court asserted that "in construing this federal statute, we think it unnecessary to justify our construction by holding that the sale 'extinguishes' or 'satisfies' the mortgage or the lien, or that the mortgage is somehow 'merged' in the judgment or in the deed of sale under state law." Id. at 1436.

78. Id.

79. See supra notes 39-52 and accompanying text.

80. See supra notes 54-66 and accompanying text.

81. Id.
variations in state law.  

A. THE SEVENTH CIRCUIT: A DISTINCTION WITHOUT A DIFFERENCE

One commentator has described the Clark decision as a particularly thoughtful opinion on the complicated question of the Chapter 13 cure provisions. Indeed, the Seventh Circuit cannot be faulted for holding that in a lien theory state the debtor can cure a mortgage default before foreclosure sale. The problem with Clark is the negative implication of its holding—that a debtor cannot cure a mortgage default after foreclosure judgment in title theory states.

This implication is flawed for two reasons. First, the concept of "title" does not affect the applicability of the automatic stay in bankruptcy. Whether a creditor will be stayed from pursuing a foreclosure sale once the debtor files for bankruptcy is not determined by title status. Second, title status bears no relation to the Chapter 13 cure provisions. Whether debtors can cure defaults on their mortgages debts should not depend on whether title to the property securing the debt has transferred.

1. Title Theory and the Automatic Stay

Title status is not dispositive of the applicability of the automatic stay because the bankruptcy estate is not limited to the debtor's "title" interests in property. The bankruptcy estate is broader, encompassing "all legal and equitable interests of the debtor in property." Before a foreclosure sale, regardless of when title passes, mortgagors have a substantial interest in their home: the equity of redemption.

In every jurisdiction—whether title theory or lien theory

82. See supra notes 68-78 and accompanying text.
84. As noted above, the Seventh Circuit bankruptcy courts have interpreted Clark as placing the Chapter 13 cure provisions beyond the reach of many debtors in title theory states. See supra note 52 and accompanying text.
85. See infra notes 87-97 and accompanying text.
86. See infra notes 98-115 and accompanying text.
87. See supra note 14.
— a mortgagor has the right, after default, to pay the entire mortgage debt and remove the mortgage encumbrance from the property.\textsuperscript{90} In virtually every state, this right survives until a valid foreclosure sale.\textsuperscript{91} A product of the common law, the equity of redemption is a substantial right\textsuperscript{92} "jealously" protected by the courts.\textsuperscript{93} Moreover, this equitable right passes to the bankruptcy estate when the debtor files for bankruptcy.\textsuperscript{94} As property of the bankruptcy estate, the filing of a bankruptcy petition stays any action adverse to the equity of redemption.\textsuperscript{95} A foreclosure sale terminates this right of redemption\textsuperscript{96} and therefore is stayed under section 362.\textsuperscript{97}

By distinguishing between title and lien theory in Chapter 13 proceedings, the \textit{Clark} court makes a distinction without a difference. In either case the mortgage debtor retains an equitable right of redemption until the foreclosure sale. Regardless of when title passes or what mortgage theory the state follows, the automatic stay should block a foreclosure sale of property in which the debtor has at least an equity of redemption.

2. Title Theory and the Cure Provisions

Besides the question of the scope of the automatic stay, the

\begin{enumerate}
\item[\textsuperscript{90}] G. NELSON & D. WHITMAN, \textit{supra} note 1, § 7.1, at 478.
\item[\textsuperscript{91}] \textit{Id.}
\item[\textsuperscript{92}] As the Supreme Court has held, "[the equity of redemption] is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed." \textit{Peugh} v. \textit{Davis}, 96 U.S. 332, 337 (1878); \textit{see also} \textit{Meyer}son v. \textit{Werner}, 683 F.2d 723, 729 (2d Cir. 1982) (Pratt, J., concurring and dissenting) (quoting this same passage from \textit{Peugh}).
\item[\textsuperscript{93}] G. NELSON & D. WHITMAN, \textit{supra} note 1, § 7.1, at 478.
\item[\textsuperscript{94}] \textit{See} In re \textit{Fitch}, 102 Bankr. 139, 140 (Bankr. N.D. Ill. 1989) (holding that a mortgagor has a significant equity of redemption interest in the mortgaged property until foreclosure sale so that the property is included in the bankruptcy estate); \textit{Anderson} v. \textit{Associates Commercial Corp.} (\textit{In re \textit{Anderson}}), 29 Bankr. 563, 564 (Bankr. E.D. Va. 1983) (mem.) (holding that debtor's right to redeem repossessed tractor passes to bankruptcy estate and thus court can compel entity in possession to turn over the property); 4 \textit{COLLIER ON BANKRUPTCY} ¶ 541.07, at 541-31 (15th ed. 1989) (stating that "\[a\]n equity of redemption comes within the scope of 'all legal or equitable interests of the debtor in property' and as such becomes part of the bankruptcy estate pursuant to section 541(a)(1)'').
\item[\textsuperscript{95}] \textit{See supra} note 14.
\item[\textsuperscript{96}] G. NELSON & D. WHITMAN, \textit{supra} note 1, § 7.1, at 478; \textit{see also} \textit{Trauner} v. \textit{Lowry}, 369 So. 2d 531, 534 (Ala. 1979) (finding that the equity of redemption is extinguished by a valid foreclosure sale).
\item[\textsuperscript{97}] \textit{See supra} note 14 (discussing the breadth of the automatic stay).
\end{enumerate}
Clark opinion suggests that the Seventh Circuit focused on title status because it felt obligated to identify the debtor's home as property of the estate and therefore subject to court administration. The flaw in this analysis transcends the fact that the bankruptcy estate consists of the debtors' legal and equitable interests in property, as well as the debtor's "title" interests. The Seventh Circuit also errs in searching for an interest in the home at all.

The Code's language obviates the need for the Clark court's preliminary examination of the debtors' rights in the home. "Claim," which the Code defines as a "right to payment," is the operative word in the Chapter 13 cure provisions. The debtor's home becomes relevant to the cure provisions only because claims secured by the debtor's home are treated differently than those secured by other property. The appropriate question is not whether the debtor has title to the home, or even whether the debtor has an equitable or legal interest in the home. The central question is whether the debtor was subject to a "claim" when she filed for bankruptcy under Chapter 13.

98. In re Clark, 738 F.2d 869 (7th Cir. 1984).
99. See, e.g. Laurence, supra note 85, at 138. Professor Laurence noted: The court turned to state law to determine the impact of the foreclosure judgment and found that the lender still had only a lien in the property and therefore the debtor still had an "interest" that became property of the estate under section 541. Hence, the automatic stay applied and there was property with which the chapter 13 plan might deal. Id. (citations omitted) (emphasis added). As noted above, a number of courts have adopted this approach to the cure provisions. See supra note 44.
100. See supra text accompanying notes 39-52 (discussing the Seventh Circuit's reasoning).
102. The debtor's home also is relevant to § 1322(b)(5), as subsection (5) was drafted to address home mortgage loans. See supra note 30.
103. In the words of the Roach court: the parties err when they focus on how much of a property interest the Roaches retained following the foreclosure sale. The relevant text of § 1322(b) speaks of obligations of the debtor as to which cure of a default is authorized, not of the property interests of the debtor in property pledged to secure those obligations. In re Roach, 824 F.2d 1370, 1372 n.1 (3d Cir. 1987). See cases cited supra note 60; cf. Justice v. Valley Nat'l Bank, 1078 F.2d 1078, 1084 (8th Cir. 1988) (holding analogous cure provisions of Chapter 12 have particular reference to contractual mortgage rights and are not applicable after foreclosure sale has satisfied the mortgage obligation).

Such analysis is not unique to the Chapter 13 cure provisions. Courts engage in similar reasoning in applying the Code provisions that permit the bankruptcy trustee to "assume or reject any executory contract or unexpired
Given the statutory language, the Clark court’s focus on title status again draws a distinction without a difference. In lien theory states, the mortgagor has both legal and equitable title to the property;\textsuperscript{104} in title theory states, the mortgagor holds only equitable title while the mortgagee holds legal title.\textsuperscript{105} In both types of states, however, the mortgagor owes a contractual debt to the mortgagee.\textsuperscript{106} Regardless of which theory a state follows, a mortgage creates a claim, or “a right to payment,” in favor of the mortgagee.

The title distinction not only lacks a statutory basis, but also is groundless from a policy perspective. The title theory of mortgages is an historic relic.\textsuperscript{107} The theory originated in 13th century England when possession was the only way a holder of a property interest could demonstrate and protect his interest.\textsuperscript{108} Today, maintenance of written conveyance records renders the title theory obsolete and most states recognize a mortgage for what it really is: the creation of a security interest.\textsuperscript{109} Permitting the distinction between title and lien theory states to determine a debtor’s right to cure under Chapter 13 elevates form over substance to an impermissible degree.\textsuperscript{110}

lease of the debtor.” 11 U.S.C. § 365 (1988). Rather than focusing on the object of the contract or lease, courts first inquire whether the contract or lease was still in existence at the time the bankruptcy petition was filed. See 2 COLIER ON BANKRUPTCY ¶ 365.02 (15th ed. 1989) (stating that “if the contract or lease has expired by its own terms or has been terminated prior to the commencement of the bankruptcy case, then there is nothing left for the trustee to assume or assign”). Id. See Vanderpark Properties v. Buchbinder (In re Windmill Farms), 841 F.2d 1467, 1469 (9th Cir. 1988).

\textsuperscript{104} See supra note 46.

\textsuperscript{105} Id.

\textsuperscript{106} G. NELSON & D. WHITMAN, supra note 1, § 1.1, at 4.

\textsuperscript{107} For a general discussion of the historical development of the law of mortgages, see Burkhart, supra note 46, at 303-29.

\textsuperscript{108} Id. at 304; see also United States v. Crawford (In re Crawford), 2 Bankr. 589, 593-95 (N.D. Ill. 1980) (tracing the origin of the title theory of mortgages to real estate transfer practices among Jews in medieval England).

\textsuperscript{109} Crawford, 2 Bankr. at 594; see also supra note 46. Even title theory states generally recognize that the mortgagee holds title for security purposes only:

\textsuperscript{110} In the words of one court, “this archaic device should not be determinative of debtor-creditor rights at the present day under the Bankruptcy
Since the Clark decision, bankruptcy courts in the Seventh Circuit have uniformly held that the right to cure survives until foreclosure sale. These courts have done so, however, by determining that their states followed the lien theory and not the title theory of mortgages. The potential problem with a title status approach, then, is application of the Clark rule in title theory jurisdictions. If courts blindly follow Clark in these states, the Chapter 13 cure provisions will be denied to debtors who file for bankruptcy after entry of a foreclosure judgment. As argued below, terminating the right to cure at judgment renders the Code either illogical or internally inconsistent and yields an inequitable result.

B. THE THIRD CIRCUIT: MERGING AWAY THE MORTGAGE

The Third Circuit correctly approached the Chapter 13 cure provisions, rejecting the Seventh Circuit's mortgage theory scheme and focusing instead on the contractual relationship between the parties. The Roach court concluded that the right to cure terminates at foreclosure judgment. Unfortunately, the Third Circuit stopped short; it failed to scrutinize either the Code's language or the policy considerations purportedly supporting its decision.

1. An Inconsistent Approach to the Statutory Language

The Third Circuit's analysis rests on section 1322(b)(5), which provides for the curing of defaults on long-term loans. The Roach court ruled that when a mortgage debt merges into a foreclosure judgment under state law, there no longer is a long-term obligation that the debtor can cure. Under the court's analysis, the foreclosure judgment converts the mort-

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111. See supra note 52 and accompanying text (discussing the post-Clark Seventh Circuit Chapter 13 cases).
112. One court was so convinced that the result would be opposite in a title theory state that it resolved the ambiguity regarding whether Illinois followed the title theory or lien theory in favor of the lien theory to avoid a conflict with the right to cure under the federal Bankruptcy Code. See In re Schnupp, 64 Bankr. 763, 768-69 (Bankr. N.D. Ill. 1986) (mem.) (discussed infra note 52).
113. Title theory jurisdictions are listed supra note 46.
114. See supra notes 39-52 and accompanying text.
116. See supra note 17.
117. Roach, 824 F.2d at 1377.
gage claim into a “judicial lien,” which is beyond the reach of the section 1322(b)(5) cure provisions.

This analysis works when the frame of reference is restricted to section 1322(b)(5). When considered in conjunction with section 1322(b)(2), however, the Third Circuit’s argument breaks down. Section 1322(b)(2) permits modification of any claim, except those claims “secured only by a security interest” in the debtor’s home. “Security interest” is not a generic term in the Bankruptcy Code. The Code breaks down all liens into three mutually exclusive categories: security interests, statutory liens, and judicial liens.

If the foreclosure judgment converts the antecedent “security interest” into a “judicial lien,” the mortgagee’s claim is no longer secured by a “security interest” in the debtor’s home. Rather, the claim is secured by a “judicial lien.” Because section 1322(b)(2) bars only modification of claims secured by a “security interest” and not a “judicial lien,” the debtor can modify the mortgagee’s claim in her Chapter 13 plan. The Roach court’s analysis, when applied to the other relevant section of the cure provisions, produces an anomalous result. A mortgagee who seeks and obtains a foreclosure judgment ends up in a worse position. Before judgment, the mortgagee’s claim is subject only to cure of a mortgage default. After judgment, the mortgagee’s claim is subject to modification.

Congress did not intend such a result, and accordingly most courts have ruled that a foreclosure judgment does not impair the mortgagee’s protection under section 1322(b)(2).

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119. See Roach, 824 F.2d at 1378 (noting that “cure” and “default” are meaningless with regard to judgments).


121. Those “created by an agreement.” Id. at § 101(45) (emphasis added).

122. Those arising by operation of a statute. Id. at § 101(47).

123. Those “obtained by judgment.” Id. at § 101(32).

124. See supra note 31 (discussing the concern for mortgage lenders embodied in the Chapter 13 cure provisions).

125. Most courts have focused on the clear intent of § 1322(b)(2) to protect mortgage lenders, and ruled that a state court foreclosure judgment does not destroy the protection the section grants to mortgagees. See Seidel v. Larson (In re Seidel), 752 F.2d 1382, 1386-87 (9th Cir. 1985) (holding that permitting modification of a mortgagee’s claim simply because that claim has been reduced to judgment contravenes clear congressional intent); accord In re Brunson, 87 Bankr. 304, 311 (Bankr. D.N.J. 1988); First Fin. Sav. & Loan Ass’n v. Winkler, 29 Bankr. 771, 775-76 (N.D. Ill. 1983); see also In re Ivory, 32 Bankr.
Nonetheless, the *Roach* court's logic ultimately leads to this anomalous result. Only by rendering the Code internally inconsistent can one avoid this anomaly and still adhere to the *Roach* decision. For purposes of section 1322(b)(5), the consensual mortgage agreement must be deemed extinguished by the judgment, but under section 1322(b)(2), one must ignore that conclusion and hold that the claim against the debtor is still secured by a consensual mortgage agreement.

Courts should avoid a construction of Chapter 13 that defeats one of its primary purposes — to protect mortgage lenders from modification of their claims26 — or renders it internally inconsistent. Courts can avoid such a result by rejecting the Third Circuit's extreme deference to state court judgments. As long as the mortagee's "right to payment" remains unsatisfied, the debtor cannot modify its terms, but can cure payment defaults.27 Because the mortgage debt — whether in the form of a judgment or not — is outstanding until the property is sold

788, 793 (Bankr. D. Or. 1983) (rejecting an interpretation of section 1322(b)(2) that would give mortagees less rights than they had before entry of a foreclosure judgment); In re Collins, 19 Bankr. 209, 211 (Bankr. S.D. Fla. 1982) (same).

Some courts, however, have mechanically applied § 1322(b)(2) to the detriment of mortgagees. In In re Garner, 13 Bankr. 799 (Bankr. S.D.N.Y. 1981), the mortgagee obtained a foreclosure judgment of $48,000 before the debtor filed under Chapter 13. *Id.* at 800. The bankruptcy court held that the debtor could not cure the mortgage default under § 1322(b)(5), as there was no longer a claim that could be cured. *Id.* at 801. The court further held, however, that because the claim was no longer secured by a "security interest," the debtor could modify the claim under § 1322(b)(2). The Garner court applied the "cram down" provisions of §§ 1325(a) and 506(a), allowing the secured claim to be reduced from the judgment amount to the value of the debtor's home. *Id.* The differential was treated as an unsecured claim and disposed of in accordance with the plan's treatment of unsecured claims. *Id.*; see also In re Jordan, 5 Bankr. 59, 63 (Bankr. D.N.J. 1980) (holding that the mortagee who has obtained a judgment lien is not protected by the ban on modification in § 1322(b)(2)).


127. In addition to rendering the Code internally consistent, this approach more closely approximates congressional intent, had Congress considered this issue. As argued in a recent case, courts must recognize the crucial distinction between the common law doctrine of merger, *see supra* note 60, and statutory interpretation. *See Federal Land Bank v. Cupple Bros.*, 889 F. 2d 764, 769-70 (1989) (Arnold, J., dissenting).

In *Cupple Bros.*, debtor farmers sought to restructure their agricultural loan pursuant to the Agriculture Credit Act of 1987. *Id.* at 766. The 8th Circuit rejected the debtors' attempt, holding that the loan merged into a state court judgment of foreclosure before the effective date of the statute and therefore was no longer in existence when the statute became effective. *Id.* at 767. This ruling brought a persuasive and well-reasoned dissent:
at foreclosure sale,\textsuperscript{128} this approach yields a termination point of at least foreclosure sale.

Reading "claim" in the cure provisions to refer to the pre-judgment agreement between the parties does not depart dramatically from the statutory interpretation adopted by most courts, including the Third Circuit in \textit{Roach}. Virtually every court has held that the term "claim" in the cure provisions refers to the pre-acceleration claim.\textsuperscript{129} Holding otherwise, these courts note, would render the Chapter 13 cure provisions meaningless.\textsuperscript{130} Similarly, the provisions are drastically weakened when state court judgments are regarded as dispositive of the debtor's right to cure.

2. The \textit{Roach} Analysis: A Cursory Look at Policy

One could tolerate a statutory construct that produced an illogical or internally inconsistent result if strong policy arguments supported such an interpretation. In this case, however, policy considerations suggest the opposite — that foreclosure judgment is \textit{not} an appropriate point for termination of the statutory right to cure.

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\textit{Did the loan, by virtue of being reduced to judgment, immediately cease to be a loan in the sense that Congress used that word? I think the answer is no. In deciding otherwise, the Court relies on the familiar common-law doctrine of merger... "Merger" is simply a way of saying that a debt that has been reduced to judgment is treated differently, for some purposes, from a debt that has not been reduced to judgment. After judgment, for example, no new action may be brought on the debt. Such an action is barred by the merger aspect of the doctrine of \textit{res judicata}... It makes no sense to transplant this merger concept into the present case and apply it mechanically to quite a different question, a question not of common-law doctrines but of statutory interpretation... [The Court's use of the merger doctrine to interpret an Act of Congress is based on the fallacy that a word must mean the same thing every time it is used. If a debt or a loan reduced to judgment is no longer a debt or a loan for \textit{res judicata} purposes, the Court seems to say, then it can't be a loan for purposes of the Agricultural Credit Act of 1987. It seems to me extremely unlikely that Congress, which passed the law in an effort to help farmers in trouble, intended its purpose to be confined by a technical state-law doctrine conceived and applied for quite different purposes. I believe that both borrowers and lenders, in everyday business dealings and speech, would continue to think of the Cupples Brothers as having a... loan... notwithstanding the fact that the Bank had secured a judgment.}

\textit{Id. at 769-70. (Arnold, J., dissenting)}

\textsuperscript{128} G. NELSON & D. WHITMAN, \textit{supra} note 1, § 1.1, at 4.

\textsuperscript{129} \textit{See supra} note 37.

\textsuperscript{130} \textit{See supra} note 35 (discussing holding of \textit{In re} Taddeo, 685 F.2d 24 (2d Cir. 1982)).
A state court judgment of foreclosure does not, in a practical sense, alter the parties' relationship. The judgment confirms what the parties already knew: the entire debt is due and the mortgagee may sell the property at a later foreclosure sale.\textsuperscript{131} Moreover, until foreclosure sale the mortgagee and mortgagor are the only parties who have an interest in the home. Third party buyers at foreclosure sales are not yet involved. The Third Circuit acknowledged that the congressional intent to protect the debtor precludes courts from cutting off the right to cure at acceleration.\textsuperscript{132} The \textit{Roach} court nonetheless held that mere judicial confirmation of the accelerated debt, a confirmation without practical effect, was dispositive of the debtor's right to cure.

The Third Circuit found that drawing a line between acceleration and foreclosure judgment did not undermine the Code's policies because the complaint gives debtors notice that their rights are in jeopardy.\textsuperscript{133} The court held that this notice was sufficient to enable Chapter 13 debtors to seek legal advice in a timely fashion.\textsuperscript{134}

The \textit{Roach} court's estimation of the average debtor's legal sophistication is questionable. Often unsophisticated consumer debtors seek counsel only after judgment, when a foreclosure sale is imminent.\textsuperscript{135} After reviewing data on the number of pending Chapter 13 mortgage foreclosure cases, a bankruptcy judge within the \textit{Roach} court's own Third Circuit concluded that denying debtors the opportunity to satisfy\textsuperscript{136} a foreclosure judgment drastically reduces the number of debtors who could use the cure provisions to retain their homes.\textsuperscript{137} The large

\textsuperscript{131} Zaretsky, \textit{supra} note 36, at 477. In New Jersey, a foreclosure judgment "fixes the amount due under the mortgage and directs the sale of the real estate to raise the funds to satisfy the amount due." \textit{In re Roach}, 824 F.2d 1370, 1378 (3d Cir. 1987) (quoting Eisen v. Kostakos, 116 N.J. Super. 358, 365, 282 A.2d 421, 424 (App. Div. 1971)). In Wisconsin, a foreclosure judgment "does little more than determine that the mortgagor is in default, the amount of principle and interest unpaid, [and] the amounts due... [the] mortgagee for taxes." \textit{In re Clark}, 738 F.2d 869, 871 (7th Cir. 1984) (quoting Marshall & Ilsley Bank v. Greene, 227 Wis. 155, 164, 278 N.W. 425, 429 (1938)).

\textsuperscript{132} \textit{Roach}, 824 F.2d. at 1377 (noting that "if § 1322(b) is construed not to authorize the reversal of an acceleration of home mortgage debt, it will rarely provide to debtors the relief contemplated by Congress").

\textsuperscript{133} \textit{Id.} at 1378. \textit{See supra} note 65.

\textsuperscript{134} \textit{Roach}, 824 F.2d at 1378.

\textsuperscript{135} 5 \textsc{Collier on Bankruptcy} § 1322.09, at 1322-25 (15th ed. 1985) (citing \textit{Glenn}, 760 F.2d at 1438; \textit{Taddeo}, 685 F.2d at 27).

\textsuperscript{136} \textit{See infra} note 136.

\textsuperscript{137} \textit{In re Brunson}, 87 Bankr. 304, 307 (Bankr. D.N.J. 1988). In \textit{Brunson},
number of reported cases in which homeowners suffered a foreclosure judgment prior to filing for bankruptcy indicates that many debtors do not seek legal advice upon commencement of a foreclosure proceeding.\textsuperscript{138} Presumably, if mortgage debtors sought such counsel, they would have filed for bankruptcy before judgment to ensure their right to cure.

The Third Circuit recognized that extending the cut-off period beyond foreclosure judgment would benefit some Chapter 13 debtors.\textsuperscript{139} According to the court, however, this benefit was relatively small compared to the harm that would result from such an extension.\textsuperscript{140} In particular, the \textit{Roach} court was concerned that overturning state court judgments would create uncertainties in the application of state property law and cloud real estate titles.\textsuperscript{141}

This argument is unconvincing because completed foreclosure sales, including those in which third parties have purchased the property, are regularly set aside under the Bankruptcy Code.\textsuperscript{142} The policy behind avoiding foreclosure sales differs

the Chapter 13 debtors were precluded from curing their mortgage defaults under \textit{Roach} and thus sought to “satisfy” the foreclosure judgment over the life of the plan.


\textsuperscript{139} \textit{Roach}, 824 F.2d at 1378.

\textsuperscript{140} \textit{Id.} See text accompanying supra note 66.

\textsuperscript{141} \textit{Id.} 824 F.2d at 1378. Given that the cure provisions clearly are an attempt to reconcile the interests of mortgage lenders and mortgage borrowers, the Third Circuit should have considered the \textit{direct} cost to mortgagees of setting aside state court judgments. Assessing these costs, however, the court would have found that disregarding state court judgments of foreclosure would impose very little economic burden on mortgage lenders. First, expenses incurred by the mortgagee in the foreclosure process are usually recoverable from the debtor under the mortgage agreement. Zaretsky, supra note 36, at 447. Second, until a later point in the foreclosure process, possibly sale, the mortgagee will not have taken any action in reliance on the state court judgment. \textit{Id.}

\textsuperscript{142} The Code permits the trustee to avoid transfers of interests of the debtor that are constructively fraudulent. The Code provisions read, in pertinent part:

The trustee may avoid any transfer of an interest of the debtor in
from the rationale for setting aside state foreclosure judgments under section 1322(b). Nonetheless, if states endure this "uncertainty" in the application of state property law and this "clouding" of real estate titles, they certainly can handle these problems should a bankruptcy court nullify a judgment of foreclosure. Moreover, this minor blow to the finality of state court judgments must be weighed against the far more deleterious consequences of blindly respecting these foreclosure judgments.143

Overall, the Third Circuit approached the problem correctly. Instead of following the blind lead of mortgage theory, the court adhered to the Code provisions and addressed the contractual relationship between the mortgagee and mortgagor. The Roach court erred, however, by concluding that the cure provisions were inapplicable if the mortgagee already had obtained a state court judgment of foreclosure. In addition to rendering the Code either illogical or internally inconsistent, the court's holding contravenes the policy considerations underlying the Chapter 13 cure provisions.

C. THE SIXTH CIRCUIT: AN EQUITABLE RESULT FROM A QUESTIONABLE APPROACH

Although the Sixth Circuit reached an equitable result by holding that the right to cure survives a foreclosure judgment,144 the court's analysis incorrectly disregarded state law. It is a basic premise of bankruptcy that absent some overriding

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143. See supra note 135 and accompanying text (noting that debtor-homeowners often fail to seek legal advice until after entry of a foreclosure judgment).

144. See supra notes 67-78 and accompanying text.
federal interest, state law defines the property interests of the debtor.145 By simply ignoring state law, the Glenn court neglected this doctrine and thus limited the strength of its decision.146 The final outcome in Glenn — permitting the debtor to cure the mortgage default after foreclosure judgment — comports with the Code's language and important policy considerations.147 The court, however, could have reached this result by expressly ruling that the Bankruptcy Code trumps any state law that terminates the right to cure at judgment. If the Sixth Circuit had addressed the role of state law, other courts could give Glenn the authority that its equitable result deserves.

D. A LOGICAL APPROACH TO POST-JUDGMENT CURE UNDER CHAPTER 13

The above analysis suggests several straightforward rules courts should follow in addressing the effect of a foreclosure judgment on the Chapter 13 cure provisions.

1. State law governs absent an overriding federal interest.

The general rule in bankruptcy is that state law determines the debtor's property rights absent an overriding federal interest.148 Regardless of whether the Bankruptcy Code ultimately preempts state law, a proper analysis of the cure provisions at least must begin with an examination of the debtor's state law interests. The Glenn court violated this fundamental premise. Although the Sixth Circuit held that the right to cure survives a foreclosure judgment, this equitable result rests on analytically shaky ground.

145. See supra note 56.

146. Very few courts outside the Sixth Circuit have adopted the Glenn approach of setting a uniform cut-off point for exercise of the Chapter 13 cure provisions. One of the few cases to apparently follow Glenn is Boromei v. Sun Bank, 92 Bankr. 516 (Bankr. M.D. Fla. 1988). Even in Boromei, however, the court held that the overriding federal interest of rehabilitating debtors preempted state law, which, the creditors argued, extinguished the mortgage debt at judgment. Id. at 517-18. The Boromei court did not ignore state law; it ruled that there was a compelling federal interest to the contrary, an approach different from that of the Glenn court and well within the Supreme Court's Butner framework.

The Glenn court itself recognized the doctrinal weakness in its "pragmatic" approach, noting that its list of policy reasons in support of foreclosure sale as the proper cut-off point "may form a large target of criticism." In re Glenn, 760 F.2d 1428, 1435 (6th Cir. 1985).

147. See supra notes 39-52 and accompanying text.

148. See supra note 56.
2. The Automatic Stay Blocks a Foreclosure Sale Regardless of Mortgage Theory.

Once a debtor files a bankruptcy petition, a court must decide if the automatic stay blocks further foreclosure proceedings. To do so, the court need only find the bankruptcy estate has an interest in the mortgaged property that will be adversely affected by further action in the foreclosure proceeding. An interest in the property is a broader concept than the Seventh Circuit's focus on "title." Title is an interest that passes to the bankruptcy estate, but so is the debtor's equity of redemption.¹⁴⁹ In every jurisdiction, regardless of which theory of mortgages the state follows, the debtor who files for bankruptcy before foreclosure sale has an interest in the property that triggers the automatic stay to block a foreclosure sale.

3. The Right to Cure: A Separate Question

Whether the debtor can cure a mortgage default does not depend on whether the state follows the title theory or lien theory of mortgages, or when "title" officially passes from the mortgagor. These mortgage theory questions are unrelated to determining whether a debtor can cure a default on an obligation owed to a creditor. The Seventh Circuit incorrectly asked what interest the debtors have in their property, rather than what interest the debtors have in the mortgage debt.¹⁵⁰ The debtor's right to cure depends on state contract law, not mortgage theory. Thus, the appropriate question is whether, at the time of the bankruptcy filing, the debtors were subject to a "claim" of the type described in section 1322(b)(5).¹⁵¹

The Roach court recognized the folly of focusing on the debtor's interest in the property.¹⁵² The Third Circuit correctly regarded the Chapter 13 cure provisions as a question of state contract law, not mortgage theory. The court erred, however, in deeming the cure provisions inapplicable once the mortgage debt merged into a state court judgment of foreclosure. Permitting entry of a state court foreclosure judgment to determine the applicability of the Chapter 13 cure provisions renders these provisions either illogical or internally inconsistent.¹⁵³ The Code's language as well as policy considerations suggest

¹⁴⁹. See supra notes 87-97 and accompanying text.
¹⁵⁰. See generally supra notes 100-15 and accompanying text.
¹⁵¹. See supra note 103 and accompanying text.
¹⁵². Id.
¹⁵³. See supra notes 117-31 and accompanying text.
that the right to cure survives foreclosure judgment, regardless of whether state law "merges" or extinguishes the mortgage debt at judgment.

CONCLUSION

Chapter 13 of the Bankruptcy Code affords debtors the right to cure a default on their home mortgage. The federal circuit courts agree that this right survives a mortgagee's acceleration of the mortgage debt. The federal appellate courts disagree whether Chapter 13 debtors can cure their mortgage defaults if the mortgagee accelerates the debt and obtains a foreclosure judgment before the debtor files for bankruptcy. Because of this judicial controversy, entry of a state court judgment of foreclosure may deny debtor-homeowners the opportunity to cure their mortgage defaults and save their family homes.

This Note argues that the federal circuit courts have misconstrued and therefore misapplied the Chapter 13 cure provisions. The Seventh Circuit unduly focuses on state mortgage theory. The language of the cure provisions does not support predating a debtor's right to cure on whether state law follows the lien or title theory of mortgages. Although the Third Circuit correctly frames the issue as one of state contract law and not mortgage theory, its conclusion that debtors may lose the right to cure at foreclosure judgment contravenes the statutory language as well as the policy considerations underlying the Chapter 13 cure provisions. Finally, the Sixth Circuit ignores a fundamental premise of bankruptcy law — that state law governs the debtor's property and contract rights absent an overriding federal interest — and thus undermines its holding that the right to cure survives foreclosure judgments.

Analysis of the Chapter 13 cure provisions should begin with the debtor's state law interests. In every jurisdiction, a debtor who files for bankruptcy before foreclosure sale has an equitable right to redeem her home. This equitable interest passes to the bankruptcy estate, therefore the Code's automatic stay blocks a mortgagee from initiating a foreclosure sale. Moreover, a foreclosure judgment merely confirms the mortgagee's right to payment, it does not extinguish the debtor's right to cure her mortgage defaults. Proper construction of section
1322(b), as well as relevant policy considerations, require that the debtor's right to cure survive foreclosure judgment.

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