

No.

IN THE
Supreme Court of the United States

STEPHEN D. FODGE, ET AL, PETITIONERS

v.

TRUSTMARK NATIONAL BANK, ET AL

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Louisiana law allows banks to use “confession of judgment” clauses embedded in mortgage documents to seize and sell the homes of military personnel while on active duty without appointing an attorney for the absent service member and without affording a hearing of any kind. Does this practice violate the Supremacy Clause when the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901-4043) invalidates these clauses and temporarily suspends these foreclosure proceedings during the service member’s active military duty?

PARTIES TO THE PROCEEDING

Stephen D. Fodge; Joseph E. Carey; Jon A. Tokay; Pamela R. Jeffcoat; Andrew J. Kaltenmark; Lance K. Inovejas; and Deborah A. Inovejas, each appearing Individually and as representative on behalf of all similarly situated persons, *Petitioners*,

Trustmark National Bank; Ocwen Loan Servicing, L.L.C.; Barksdale Federal Credit Union; PennyMac Loan Services, L.L.C.; Bank of America, N.A.; and P H H Mortgage Corporation, *Respondents*.

STATEMENT OF RELATED CASES

None

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit in *Steven D. Fodge et al. v. Trustmark National Bank et al.*, C.A. No. 19-30279, decided December 19, 2019, and reported at 945 F.3d 880 (5th Cir. 2019), affirming the orders of the District Court granting respondents' motions to dismiss petitioners' complaint and granting respondent Trustmark National Bank's motion for judgment on the pleadings, is set forth in the Appendix hereto (App. 1-7).

The unpublished and unreported Memorandum Ruling of the United States District Court for the Western District of Louisiana, Shreveport Division, in *Steven D. Fodge et al. v. Trustmark National Bank et al.*, Civil Action No. 18-0386, filed April 4, 2019, granting respondent Trustmark National Bank's motion for judgment on the pleadings, is set forth in the Appendix hereto (App. 8-9).

The unpublished Memorandum Ruling of the United States District Court for the Western District of Louisiana, Shreveport Division, in *Steven D. Fodge et al. v. Trustmark National Bank et al.*, Civil Action No. 18-0386, filed March 18, 2019, and reported at 2019 WL 1245802 (W.D. La. 2019), granting respondents' motions to dismiss petitioners' complaint, is set forth in the Appendix hereto (App. 10-22).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Steven D. Fodge et al. v. Trustmark National Bank et al.*, C.A. No. 19-30279, filed January 30, 2020, denying the

petitioners' petition for panel rehearing, is set forth in the Appendix hereto (App. 23-24).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the orders of the District Court granting respondents' motions to dismiss petitioners' complaint and granting respondent Trustmark National Bank's motion for judgment on the pleadings, was entered on December 19, 2019; and its further order denying petitioners' timely filed petition for panel rehearing was filed and decided on January 30, 2020 (App. 1-7;23-24).

In addition, on March 19, 2020, in light of the ongoing health concerns relating to COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

**United States Constitution, Art. I, § 8, cl. 11
& 12:**

The Congress shall have Power...

....

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

**United States Constitution, Article VI,
Paragraph 2:**

This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law...

50 U.S.C. § 3902 [The Servicemembers Civil Relief Act]:

The purposes of this chapter are—

(1) to provide for, strengthen, and expedite the

national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C. § 3911 (5); (6); and (9) (Definitions):

For the purposes of this chapter:

....

(5) Court

The term “court” means a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record.

(6) State

The term “State” includes—

(A) a commonwealth, territory, or possession of the United States; and

(B) the District of Columbia.

....

(9) Judgment

The term “judgment” means any judgment, decree, order, or ruling, final or temporary.

50 U.S.C. § 3912. (Jurisdiction and applicability of chapter)

(a) Jurisdiction. This chapter applies to—

- (1) the United States;
- (2) each of the States, including the political subdivisions thereof; and
- (3) all territory subject to the jurisdiction of the United States.

(b) Applicability to proceedings

This chapter applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter. This chapter does not apply to criminal proceedings.

(c) Court in which application may be made

When under this chapter any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter.

50 U.S.C. § 3918(a)-(c):

(a) In general

A servicemember may waive any of the rights and protections provided by this chapter. Any such waiver that applies to an action listed in subsection (b) of this section is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies. In the case of a waiver that permits an

action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

(b) Actions requiring waivers in writing The requirement in subsection (a) for a written waiver applies to the following:

(1) The modification, termination, or cancellation of—

(A) a contract, lease, or bailment; or

(B) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

(2) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that—

(A) is security for any obligation; or

(B) was purchased or received under a contract, lease, or bailment.

(c) Prominent display of certain contract rights waivers

Any waiver in writing of a right or protection provided by this chapter that applies to a contract, lease, or similar legal instrument must be in at least 12 point type.

**50 U.S.C. § 3931(a); (b); (d) & (g)
(Protection of servicemembers against
default judgments):**

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this chapter.

(4) Satisfaction of requirement for affidavit

The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

....

(d) Stay of proceedings In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court

determines that—

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

....

(g) Vacation or setting aside of default judgments

(1) Authority for court to vacate or set aside judgment

If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that—

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application

An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

50 U.S.C. § 3953:

(a) Mortgage as security This section applies

only to an obligation on real or personal property owned by a servicemember that—

- (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
- (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation In an action filed during, or within one year after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service—

- (1) stay the proceedings for a period of time as justice and equity require, or
- (2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within one year after, the period of the servicemember's military service except—

- (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or
- (2) if made pursuant to an agreement as provided in section 3918 of this title.

(d) Misdemeanor A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited

by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

50 U.S.C. § 3991(a):

(a) Application This section applies in any case in which a tax or assessment, whether general or special (other than a tax on personal income), falls due and remains unpaid before or during a period of military service with respect to a servicemember's—

(1) personal property (including motor vehicles);
or

(2) real property occupied for dwelling, professional, business, or agricultural purposes by a servicemember or the servicemember's dependents or employees—

(A) before the servicemember's entry into military service;

and

(B) during the time the tax or assessment remains unpaid.

50 U.S.C. § 4042:

(a) In general Any person aggrieved by a violation of this chapter may in a civil action—

(1) obtain any appropriate equitable or declaratory relief with respect to the violation;

(2) recover all other appropriate relief, including monetary damages; and

(3) be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary.

(b) Costs and attorney fees

The court may award to a person aggrieved by a violation of this chapter who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

Louisiana Code of Civil Procedure, Article 2634 (Petition):

A person seeking to enforce a mortgage or privilege on property in an executory proceeding shall file a petition therefor, praying for the seizure and sale of the property affected by the mortgage or privilege. This petition shall comply with Article 891, and the plaintiff shall submit therewith the exhibits mentioned in Article 2635.

Louisiana Code of Civil Procedure, Article 2635A (Authentic Evidence Submitted With Petition):

A. In order for a plaintiff to prove his right to use executory process to enforce the mortgage, security agreement, or privilege, it is necessary only for the plaintiff to submit with his petition authentic evidence of:

(1) The note, bond, or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege.

(2) The authentic act of mortgage or privilege on immovable property importing a confession of judgment.

(3) The act of mortgage or privilege on movable property importing a confession of judgment whether by authentic act or by private signature duly acknowledged....

B. This requirement of authentic evidence is necessary only in those cases, and to the extent, provided by law. A variance between the recitals of the note and of the mortgage or security agreement regarding the obligation to pay attorney's fees shall not preclude the use of executory process.

Louisiana Code of Civil Procedure, Article 2721 (Methods of Enforcing Mortgage):

A conventional mortgage is enforced by ordinary or executory proceedings.

Louisiana Code of Civil Procedure, Article 2722 (Enforcement by Ordinary Proceeding):

When the mortgagee enforces a conventional mortgage by an ordinary proceeding, he must first obtain a judgment against the mortgagor and then execute the judgment. If it is not possible to obtain a personal judgment against the mortgagor, then the judgment shall be in rem.

Louisiana Code of Civil Procedure, Article

2723 (Enforcement by Executory Proceeding):

When the mortgagee enforces a conventional mortgage by an executory proceeding, he must comply with Articles 2631 through 2724.

STATEMENT

Louisiana is a judicial foreclosure state and a mortgagee bank seeking to foreclose on a mortgagor's equity of redemption can choose between either an ordinary judicial foreclosure or a more expedited "executory proceeding." La. Code of Civ. Proc. arts. 3721-3723. The ordinary judicial foreclosure requires the bank first to obtain a judgment against the mortgagor after trial or by default and then to execute the judgment which forces the property into a foreclosure sale the proceeds of which repay the mortgage loan. *Id.* at art. 3722.

Most banks, however, choose to foreclose by using executory proceedings, an expedited process which has existed in Louisiana for many years. In this kind of foreclosure, after the bank files its petition and supporting evidence, the court summarily orders the property seized and sold without any further process. *Id.* at arts. 2634 & 2723. The "authentic evidence" which must accompany the bank's petition are the promissory note evidencing the obligation secured by the mortgage and the mortgage documents themselves which contain a so-called "confession of judgment" clause---a clause embedded in almost all mortgage documents in Louisiana---whereby the mortgagor agrees that the bank will automatically win a foreclosure case in the

event he or she does not stay current with his/her monthly payments. *Id.* at arts. 2634 & 2635A.

Petitioners Stephen D. Fodge, Joseph E. Carey, Jon A. Tokay, Pamela R. Jeffcoat, Andrew J. Kaltenmark, Lance K. Inovejas and Deborah A. Inovejas (“petitioners”) were at all relevant times members of the Armed Forces of the United States on active military duty. Each one of them purchased a home in Louisiana between 2006 and 2013 while on active military duty and each signed promissory notes and mortgages from one of following respondent mortgagee/lender banks, either originally or by assignment: Trustmark National Bank, Ocwen Loan Servicing, L.L.C., Barksdale Federal Credit Union, PennyMac Loan Services, L.L.C., Bank of America, N.A., and P H H Mortgage (“respondents”).

Embedded within each of the mortgages or promissory notes signed by petitioners was a “confession of judgment” clause. The clause contained in petitioner Andrew J. Kaltenmark’s mortgage documents is typical:

Following Lender’s acceleration of payment [due to a borrower’s failure to make required payments or breach], Lender may commence foreclosure proceedings under this Security Instrument under ordinary or executory process, under which Lender may cause the Property to be immediately seized or sold, with or without appraisal, in regular session of court or in vacation, in accordance with Applicable Law. *For purposes of foreclosure under executory process procedure, Borrower*

confesses judgment and acknowledges to be indebted to Lender for all sums secured by this Security Instrument, in principal, interest, costs, expenses, attorneys' fees and other fees and charges.

(emphasis supplied). In the same clause, petitioners also waived the benefit of an appraisal; the right to a demand by the lender bank and the associated three-day delay; the right to notice of seizure by the lender bank and the associated three-day delay; and any other benefits provided borrowers under Louisiana law during a foreclosure procedure.

Subsequently, petitioners while still on active military duty, failed to satisfy their respective mortgage obligations. Respondents in each case then began foreclosure proceedings against these active duty service members by instituting the expedited executory process petitions in the Louisiana courts relying upon each petitioner's "confession of judgment" clause which was embedded in his or her respective mortgage documents.

Based on the "confession of judgment" clause in each of petitioners' mortgage documents, the district courts of Louisiana in each foreclosure action summarily issued an *ex parte* order at the time the foreclosure action was instituted directing the Sheriff of the Parish where the property was located to seize and sell the service member's home. In due course, the homes of each petitioner was seized and sold to a *bona fide* third-party purchaser by respondent holding or servicing the mortgage for that particular home.

When petitioners bought their homes and executed their mortgages with respondents between 2006 and 2013, their rights attendant to such transactions were defined by the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (“SCRA”). Enacted by Congress in 2003 as an exercise of its power to raise and support armies and to declare war, the SCRA sought to respond to the increased deployment of Reserve and National Guard military and to modernize and restate the protections and rights previously available to service members under the Soldiers’ and Sailors’ Civil Relief Act of 1940 (50 U.S.C. §§ 501 *et seq.*).

Spreading the burden of national military service to a broader portion of the citizenry, SCRA protects service members during their active military service by temporarily suspending certain judicial and administrative proceedings and transactions which may adversely affect their legal rights while serving in the military. 50 U.S.C. § 3902(2). For example, § 3931 protects service members against the entry of default judgments against them in any “civil action or proceeding...in which the defendant does not make an appearance.” This protection applies regardless of when the obligation was incurred, i.e., either prior to during the period of active military service.

§§ 3931(a) & (b)(2) further provide that if a defendant is in military service, the court may *not* enter a “judgment” until after the court appoints an attorney to represent the defendant and if the attorney cannot locate the service member, actions by the attorney in the case will not waive any defense of the service member or otherwise bind him or her. In addition, §

3931(d) empowers any court to grant a stay of any proceeding involving a service member for a minimum period of 90 days upon application of counsel, or on the court's own motion, if it determines that there may be a defense to the action and a defense cannot be presented without the presence of the defendant or that after due diligence, counsel has been unable to contact the defendant service member or otherwise determine if a meritorious defense to the action exists.

Moreover, by amendments to the SCRA in 2004, Congress in the so-called Veterans Benefits Improvement Act, expanded the term "judgment" as used in § 3931(b)(2) of the SCRA to mean "any judgment, decree, order, or ruling, final or temporary." 50 U.S.C. § 3911(9). It also amended § 3918 of the SCRA so that before a service member could waive any of the rights and protections provided him or her by the SCRA, that waiver must be in writing of not less than 12-point type, executed during or after the service member's period of military service, and contained within a document separate from the obligation or liability to which it applies. 50 U.S.C. § 3918(a) & (c).

Petitioners believed that respondents' resort to the "confession of judgment" clauses in their respective mortgage documents to seize and sell their homes by executory proceedings in Louisiana courts while they were on active military duty violated their rights under the SCRA. On March 20, 2018, as authorized by 50 U.S.C. § 4042(a), they brought this civil action in the federal district court for the Western District of Louisiana, Shreveport Division, both in their individual capacities and as representatives on behalf of all similarly situated persons in Louisiana. Asserting

jurisdiction under 28 U.S.C. § 1331, petitioners sought declaratory and injunctive relief together with damages for respondents' wrongful seizure of their homes and for the conversion of their other property.

In an amended complaint, petitioners claimed that under §§ 3931(a), (b)(2) and (d) of the SCRA, they were entitled to the temporary suspension of these executory foreclosure proceedings, to the appointment of counsel and to a stay in order to give them the opportunity to present a defense; that by virtue of the 2004 amendments to the SCRA, the *ex parte* orders of the Louisiana district courts directing the Sheriff of the Parish where the property was located to seize and sell their homes constituted "judgment[s]" within the expanded definition of that term under 50 U.S.C. § 3911(9); and that the "confession of judgment" clauses embedded in their respective mortgage documents could not have amounted to a valid waiver of these protections of the SCRA because under 50 U.S.C. § 3918(a) & (c), a waiver of any rights provided by the SCRA *must be in writing of not less than 12-point type, executed during or after the service member's period of military service, and contained within a document separate from the mortgage documents themselves.*

Because the "confession of judgment" clauses violated the SCRA's prohibition against waivers embedded in the mortgage documents themselves and because there was no language in the SCRA exempting Louisiana's executory process foreclosures from its purview, petitioners claimed that respondents' reliance on these invalid "confession of judgment" clauses to bring these executory proceedings (as opposed to ordinary judicial foreclosure proceedings under La.

Code of Civ. Proc. art. 3722) was unlawful. Moreover, they claimed that the *ex parte* orders summarily issued by the Louisiana courts when these foreclosure suits were filed—without first appointing an attorney to represent the absent service member and without holding a hearing of any kind—constituted “default judgments” within the protections of § 3931 as well as “judgments” within the meaning of SCRA’s definition of that term which since 2004 has been codified to mean “any judgment, decree, *order*, or ruling, final or temporary.” 50 U.S.C. § 3911(9) (emphasis supplied).

Instead of answering petitioners’ amended complaint, respondents Ocwen Loan Servicing, L.L.C., Barksdale Federal Credit Union, PennyMac Loan Services, L.L.C., Bank of America, N.A. and P H H Mortgage moved on June 21, 2018, to dismiss it for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). Petitioners opposed the motion and on March 18, 2019, the district court, Hicks, C.J., issued his Memorandum Ruling granting the motions (App. 10-22).

While no other court had yet addressed the issue of whether § 3931’s protections against default judgments applied to Louisiana’s executory foreclosure proceedings, the district court analogized the “confession of judgment” clauses here to the cognovit judgments rendered in other states which do not require an actual appearance by the debtor in the action in order for a judgment to be valid (App. 16-17). Because a “confession of judgment” clause like a cognovit judgment does not require an appearance by the service member/debtor in the action in order for the resulting foreclosure judgment to be valid, the district

judge concluded that there could be no “default judgment” produced by Louisiana’s executory proceedings and accordingly the protections against default judgments afforded military personnel by § 3931 were not invoked and did not apply to Louisiana’s executory proceedings (App. 16;17-18).

The district court also rejected petitioners’ other argument that the “confession of judgment” clauses here were never valid in the first place because they were at odds with SCRA’s requirement that such waivers be in writing of not less than 12-point type, executed during or after the service member’s period of military service, and contained within a document separate from the mortgage documents themselves (App. 19-20). As it determined, “nowhere in their numerous opposition briefs...do [petitioners] cite to any authority,...based on Louisiana law or otherwise, providing that confession of judgment provisions (and/or cognovit judgments) are required to comply with any of the requirements listed in [50 U.S.C. § 3918], or that their failure to do so has the effect of rendering such provisions invalid” (App. 20) (footnote omitted).

Furthermore, because the court had already determined that petitioners had no “rights” under § 3931 to waive since this section of the SCRA regarding default judgments does not apply to Louisiana’s executory foreclosure proceedings, the motion judge ruled that “no waiver pursuant to [§ 3918] was required in order to effectuate the foreclosures at issue” (*Id.*). All of petitioners’ claims against these respondents were thereupon dismissed with prejudice (App. 20-21).

In the wake of this ruling, respondent Trustmark

National Bank moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) (App. 8-9). Petitioners opposed the motion but nevertheless suggested that granting the motion would place the case in the correct procedural posture for an appeal (App. 9). On April 4, 2019, the district judge granted the motion and dismissed petitioners' claims with prejudice as to Trustmark (App. 8-9).

Petitioners appealed arguing that the state court orders authorizing the seizure and sale of their homes through executory proceedings constitute default judgments within the protections of 50 U.S.C. § 3931 and that they were unaccompanied by any valid waiver of such protections because their confessions of judgment could not have amounted to proper waivers under the SCRA. (App. 4-5). On December 19, 2019, the court of appeals unanimously affirmed both rulings of the district court dismissing petitioners' amended complaint (App. 1-7).

Noting that these were issues of first impression in this and other Circuits, Circuit Judge Graves ruled that 50 U.S.C. § 3931's protections against default judgments for service members on active duty do not apply to Louisiana's executory proceedings where petitioners confessed judgment (App. 5). He reasoned that § 3931 by its own terms applies only to proceedings "in which the defendant does not make an appearance" but that petitioners "necessarily made an appearance at the respective executory proceedings through their confessions of judgment" (*Id.*). As he explained, executory proceedings under Louisiana law are an expedited *in rem* civil action to effect the seizure and sale of property without previous citation and

judgment, and by virtue of a confession of judgment, a debtor in such proceedings “has appeared in the suit, and answered the demand...” (App. 6 citing *Buckner v. Carmack*, 272 So.2d 326, 331 (La. 1973) and *Marbury v. Pace*, 29 La. Ann. 557, 558-559 (La. 1877)).

Finally, because petitioners were never protected in the first place under § 3931 against the seizure and sale of their homes through Louisiana’s executory proceedings, “there is nothing [for petitioners] to waive here” and the argument that their confessions of judgment could not have amounted to proper waivers under the SCRA was unavailing (*Id.*).

On January 30, 2020, the court of appeals denied the petitioners’ timely filed petition for panel rehearing (App. 23-24).

REASONS FOR GRANTING THE PETITION

The Decision Below Violates the Supremacy Clause Because It Allows The Law of Louisiana To Extinguish The Federal Benefits And Protections Congress Intended To Provide Military Service Members On Active Duty When It Enacted The Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043.

By sanctioning respondents’ use of “confession of judgment” clauses in mortgage documents to bring expedited foreclosure proceedings in order to seize and sell the homes of American military service members while on active duty, both courts below failed to properly apply the waiver and default judgment

provisions of the SCRA, subverting Congress' express purpose when it enacted this statutory scheme in 2003. This is an important question of federal law which has not been, but should be, settled by this Court. In the first-known federal challenge to this illegal procedure, the only hope for petitioners and other service members stationed in Louisiana and other states which allow the use of these "confession of judgment" clauses with mortgage obligations is for this Court to grant certiorari, reverse the lower courts' rulings and remand the matter to the district court for further proceedings.

Enacted by Congress in 2003 as an exercise of its Article I powers to raise and support armies and to declare war, the SCRA (50 U.S.C. §§ 3901-4043) revised and expanded the protections and benefits afforded military personnel under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. §§ 501 *et seq.*, a law designed to ease the financial burdens on service members during periods of military service. The SCRA provides further protections and benefits for service members as they enter active military duty, e.g., it applies to rental agreements, security deposits, prepaid rent, evictions, installment agreements, mortgage interest rates, mortgage foreclosures and other civil judicial proceedings.

As laid out by Congress in § 3902, the SCRA's purpose is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service" in order "to enable [them] to devote their entire energy to the defense of the Nation." Moreover, the reach of its protections for service members is unmistakable: its

jurisdiction extends not only to the United States as the federal entity but also to “each of the States, including the political subdivisions thereof;” and it applies to “*any* judicial or administrative proceeding commenced in *any* court or agency in *any* jurisdiction subject to this chapter.” § 3912 (a) & (b) (emphasis supplied). See 50 U.S.C. § 3911 (5) (definition of “court”) & (6) (definition of “State”).

In December of 2004, Congress amended the SCRA in the Veterans Benefits Improvement Act, expanding the definition of the term “judgment” as used in § 3931(b)(2) of the SCRA to mean “*any* judgment, decree, order, or ruling, final or temporary.” 50 U.S.C. § 3911(9) (emphasis supplied). It also amended § 3918 so that a bank, landlord or other individual could not trick or force a service member into waiving valuable SCRA rights as a condition precedent to obtaining a mortgage, lease or job. Before a service member could waive any of those rights and protections, a waiver must now be in writing of not less than 12-point type, executed during or after the service member’s period of military service, and contained within a document *separate* from the obligation or liability to which it applies. § 3918(a) & (c).

Finally for purposes of petitioners’ claims here, § 3931 protects service members against the entry of default judgments against them in any “civil action or proceeding...in which the defendant does not make an appearance.” §§ 3931(a) & (b)(2) provide that if a defendant is in military service, the court may *not* enter a “judgment” until after the court appoints an attorney to represent him or her and if the attorney cannot locate the service member, actions by the attorney in

the case will not waive any defense of the service member or otherwise bind him or her. § 3931(d) empowers any court to grant a stay of any proceeding involving a service member for a minimum period of 90 days upon application of counsel, or on the court's own motion, if it determines that there may be a defense to the action and a defense cannot be presented without the presence of the defendant or that after due diligence, counsel has been unable to contact the defendant service member or otherwise determine if a meritorious defense to the action exists.

These provisions of the SCRA must be liberally construed "with an eye friendly to those who dropped their affairs to answer their country's call," *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948) citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943). In addition, the SCRA "is to be administered as an instrument to accomplish substantial justice," even though this "may result in detriment to parties who are not in the military service," *In re Watson*, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003), as "[o]ur country's servicemembers must have peace of mind that they will not be subject to civil actions [in] which they cannot appear and defend." *In re Templehoff*, 339 B.R. 49, 53 (Bankr. S.D. N.Y. 2005).

Given this law, petitioners' argument below was straightforward: the amendment to § 3918 in 2004 requiring that waivers be in writing, conspicuous and in a document separate from the mortgage documents themselves renders invalid the imbedded "confession of judgment" clauses later used by respondents under Louisiana law to constitute an appearance by petitioners in Louisiana courts. Because these imbedded "confession of judgment" clauses are waivers,

see *Overmyer Co. Inc. of Ohio v. Frick Company*, 405 U.S. 174, 185-186 (1972), they are invalid under the SCRA and could not constitute an appearance by petitioners in these executory proceedings in state court; and because there was no appearance by petitioners in these proceedings, the “judgment” in the form of an order by the Louisiana district court to seize and sell their homes amounted to the entry of a “default judgment” against these absent service members within the meaning of § 3931 and in violation of the protections which that section provides them in such circumstances.

As petitioners argued, in view of the SCRA’s beneficent purpose to help and protect service members when sued in civil proceeding while absent on account of their active military duty, it was the intent of Congress that the SCRA’s provisions, including those regarding waiver and default judgments, would prevail over any inconsistent state law, including Louisiana’s expedited executory foreclosure proceeding which rely on “confession of judgment” clauses embedded in the service members’ mortgage documents. That is, Louisiana law *must* give way to the protections and benefits provided service members by the SCRA when conducting these foreclosure proceedings.

Thus they contended in both courts below that “the district court should have closely adhered to the language of the SCRA,” applying time-honored canons of statutory construction, to conclude that its provisions defining its jurisdiction and application as well as its language affording waiver and default judgment protections for service members must prevail over contrary Louisiana law, endowing petitioners with the

rights, protections and benefits which Congress intended. (Notably, neither court below cited any authority for their conclusion that the executory process of foreclosure under Louisiana law was exempt from the SCRA's provisions).

This argument by petitioners clearly implies and unmistakably invokes the Supremacy Clause (Article VI, cl. 2) of the Constitution. The Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land." It also provides "a rule of decision" for determining whether federal or state law applies in a particular situation. *Kansas v. Garcia*, 589 U.S. ___, ___; ___ S.Ct. ___, ___ (3/3/2020) citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015). If federal law "imposes restrictions or confers rights on private actors" and "a state confers rights or imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted." *Id.* quoting *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. ___, ___; 138 S.Ct. 1461, 1480 (2018).

Federalism includes the principle that "both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012) citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Because the States are independent sovereigns in our federal system, *Medtronic*, 518 U.S. 470, 485 (1996), state laws are not preempted unless preemption is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-211 (1824). Thus preemption analysis

considers Congressional intent to be its “ultimate touchstone.” *Medtronic, supra*. If such preemption is found, the state law requirements touching on the controversy are “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

There are three types of federal preemption: express, field and conflict preemption. Express preemption occurs when Congress expresses an intent to preempt state law in the language of a statute. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n.*, 461 U.S. 190, 203 (1983). Field preemption is a type of implied preemption which occurs when Congress intends to fully occupy a field of regulation. *Fidelity Federal Savings and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Conflict preemption occurs when it would be “physically impossible” for a private party to comply with both federal and state law,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when “the [state] law stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Petitioners submit that the facts here prove conflict preemption. Louisiana law permits the use of “confession of judgment” clauses in petitioners’ mortgage documents to summarily foreclose on their homes while they are absent on active military duty; and this law stands as an absolute obstacle to the accomplishment of Congress’ purpose when it enacted the SCRA, i.e., “to provide for the temporary suspension of judicial and administrative proceedings

and transactions that may adversely affect the civil rights of servicemembers during their military service...” (50 U.S.C. § 3902).

Even if this Court begins the inquiry with an assumption “that the historic police powers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress,” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) quoting *Medtronic, supra*, and *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), it is impossible to harmonize the ancient, inherently unfair and disfavored use of “confession of judgment” clauses, see *Overmyer Co. Inc. of Ohio v. Frick Company*, 405 U.S. at 175-178, with the fundamentally fair due process concerns which prompted Congress to enact the waiver and default judgment protections of §§ 3918(a) & (c) and § 3931, respectively. Because of this blatant conflict, “the [state] law stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz, supra*.

“[C]onflict is imminent” whenever “two separate remedies are brought to bear on the same activity.” *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986) quoting *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953). In *Gould Inc.*, 474 U.S. at 287, this Court wrote that “to allow the State to grant a remedy...which has been withheld from the National Labor Relations Board only accentuates the danger of conflict...” because “the range and nature of those remedies that are and are not available is a fundamental part” of the comprehensive system established by Congress.” *Id.* quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247

(1959) and *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

Likewise, to allow Louisiana to *withhold* a remedy which the SCRA expressly grants to service members accentuates the danger of conflict—indeed, it *proves* the conflict— inasmuch as it is the range and nature of those remedies available to service members which is at the core of the comprehensive system Congress established by enacting this legislation. With Louisiana law at cross purposes with the intendment of the SCRA, it is preempted. See *Arizona v. United States*, 567 U.S. at 404-407; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-374 (2000); *Gould Inc.*, 475 U.S. at 288; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-143; and *Hines v. Davidowitz*, *supra*.

The Supremacy Clause Argument Is Properly Before the Court.

Petitioners repeatedly claimed below that given the SCRA's beneficent purpose to help and protect service members when sued in civil proceeding while absent on account of their active military duty, it was Congress' intent that the SCRA's provisions regarding waiver and default judgments would prevail over any inconsistent state law, including those laws which authorize Louisiana's expedited executory foreclosure proceedings.

This federal claim that Louisiana law *must* give way to the protections and benefits Congress provided service members by the SCRA when Louisiana courts conduct executory foreclosure proceedings includes by

its own terms the argument that the Supremacy Clause compels this result. The Court's traditional rule is that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 382-383 (1995) quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992). As the Court held in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991), if an issue or claim is properly before it,

the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

Id. citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).

In addition, this Court will consider new arguments which are "inextricably" intertwined with the issues at hand, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); which implicate "antecedent," *U.S. Nat'l Bank of Oregon v. Indep. Agents of Am., Inc.*, 508 U.S. 439, 447 (1990), or "predicate" questions of law which are essential to the analysis, see *Kamen*, 500 U.S. at 99-100; which are ultimately dispositive of the question at hand, *U.S. Nat'l Bank of Oregon, supra*; *Arcadia v. Ohio Power Co., supra*; or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Finally, this Court will reach arguments, if otherwise timely brought, which incidentally but necessarily raise questions of constitutional dimension.

See *Nelson v. Adams*, 529 U.S. 460, 469-470 (2000). See also *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (“courts indulge every reasonable presumption against [a] waiver” of constitutional rights). In this regard, the question of whether Louisiana may use “confession of judgment” clauses in mortgage documents to extinguish the protections and benefits available under the SCRA to service members on active duty is an exceptionally important federal question of constitutional scope---and one of first impression---which should be settled by this Court in the first instance.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Western District of Louisiana, Shreveport Division, with instructions to reinstate petitioners’ civil action for further discovery and trial or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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United States Court of Appeals, Fifth Circuit.

Steven D. FODGE, Individually and as representative on behalf of all similarly situated persons; Joseph E. Carey, Individually and as representative on behalf of all similarly situated persons; Jon A. Tokay, Individually and as representative on behalf of all similarly situated persons; Pamela R. Jeffcoat, Individually and as representative on behalf of all similarly situated persons; Andrew J. Kaltenmark, Individually and as representative on behalf of all similarly situated persons; Lance K. Inovejas, Individually and as representative on behalf of all similarly situated persons; Deborah A. Inovejas, Individually and as representative on behalf of all similarly situated persons, Plaintiffs - Appellants

v.

TRUSTMARK NATIONAL BANK; Ocwen Loan Servicing, L.L.C.; Barksdale Federal Credit Union; Pennymac Loan Services, L.L.C.; Bank of America, N.A.; PHH Mortgage Corporation, Defendants - Appellees

No. 19-30279

Summary Calendar

FILED December 19, 2019

Appeal from the United States District Court for the Western District of Louisiana, S. Maurice Hicks, Jr., Chief Judge

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Before KING, GRAVES, and WILLETT, Circuit Judges.

Opinion

JAMES E. GRAVES, JR., Circuit Judge:

Appellants Steven D. Fodge, Joseph E. Carey, Jon. A. Tokay, Pamela R. Jeffcoat, Andrew J. Kaltenmark, Lance K. Inovejas, and Deborah A. Inovejas appeal from the district court's orders granting Appellees Ocwen Loan Servicing, LLC; Barksdale Federal Credit Union; Pennymac Loan Services, L.L.C.; Bank of America, N.A.; and PHH Mortgage Corporation's motions to dismiss and Appellee Trustmark National Bank's motion for judgment on the pleadings. We AFFIRM.

I.

Appellants brought a putative class action at the district court, alleging that they and similarly situated individuals were on active duty with the military when Appellees variously foreclosed on their properties through executory proceedings in Louisiana state courts based on mortgage, privilege, or security agreements each plaintiff and putative class member had entered with one of the defendants. *882 Appellants conceded that each of their agreements contained a clause importing a confession of judgment. Nonetheless, Appellants alleged that Appellees' foreclosure actions were in violation of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3901, et seq., which provides active duty servicemembers with protections against default judgment absent a waiver that meets certain requirements. 50 U.S.C. §§ 3931 (setting out

protections against default judgment) and 3918 (providing the requirements for waiving SCRA protections). Appellants sought damages and declaratory and injunctive relief on behalf of themselves and the putative class. Each appellee, except for Trustmark National Bank, filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motions, dismissing the claims against these appellees with prejudice. Subsequently, Trustmark National Bank filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that the claims against it were nearly identical to the claims filed against the other defendants. The district court also granted this motion and dismissed the remaining claims with prejudice.

II.

“We review dismissals under Rule[s] 12(b)(6) and 12(c) de novo.” *Magee v. Reed*, 912 F.3d 820, 822 (5th Cir. 2019). The standard for dismissal under Rules 12(b)(6) and 12(c) is the same: “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

III.

Appellants argue that (1) the state court orders authorizing seizure and sale of Appellants’ respective properties through executory proceedings constitute default judgments under the SCRA and (2) they did not waive their right to SCRA protections against default

judgment because their confessions of judgment do not constitute proper waivers under the SCRA. These are matters of first impression in this and other circuits. We address each argument in turn.

First, Appellants' argument that the state court orders authorizing seizure and sale of Appellants' respective properties constitute default judgments under the SCRA is unavailing. As explained below, 50 U.S.C. § 3931 does not encompass Louisiana executory proceedings where, as here, the debtors confessed judgment.

Appellants rely on two sections of the SCRA—50 U.S.C. §§ 3931 and 3911—to support their argument. Section 3931 is entitled “Protection of servicemembers against default judgments” and “applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.” § 3931(a). Section 3931 requires, among other things, that a plaintiff file an affidavit stating whether a defendant is in military service and that courts appoint an attorney to represent defendants in military service. § 3931(b).

Appellants argue that § 3911's definition of “judgment” applies to § 3931. Section 3911 defines “judgment” as “any judgment, decree, order, or ruling, final or temporary.” § 3911(9).¹ This definition, *883 even if relevant to § 3931, is unavailing. Section 3931 states that it applies to proceedings “in which the defendant does not make an appearance.” § 3931(a). Appellants necessarily made an appearance at the respective executory proceedings through their confessions of judgment.

Under Louisiana law, an executory proceeding is an expedited in rem civil action. *Hood Motor Co., Inc. v. Lawrence*, 320 So.2d 111, 112–13 (La. 1975). Louisiana law defines such proceedings as “those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.” LA. C.C.P. ART. 2631. By virtue of a confession of judgment, a debtor in an executory proceeding “has appeared in the suit, and answered the demand.” *Marbury v. Pace*, 29 La. Ann. 557, 558–59 (La. 1877); *Buckner v. Carmack*, 272 So.2d 326, 331 (La. 1973) (same). Thus, § 3931 does not apply to Louisiana executory proceedings where, as here, the debtors have confessed judgment. In fact, Appellants conceded this. In opposing Bank of America’s motion to dismiss, Appellants “agree[d] 100%” that “Section 3931 does not apply to proceedings enforcing [valid] confessions of judgments.” For all these reasons, Appellants’ first argument is unavailing.

Second, Appellants argue that they did not waive their right to SCRA protections against default judgment because their confessions of judgment do not constitute proper waivers under the SCRA, specifically, 50 U.S.C. § 3918, which provides the requirements for a valid waiver of SCRA protections. This argument is moot. As determined above, § 3931 does not apply to Louisiana executory proceedings where the debtor has confessed judgment.² SCRA’s waiver requirements are therefore inapplicable because there is nothing to waive here; Appellants were never protected under § 3931 against seizures and sales ordered through Louisiana executory proceedings.³

IV.

For the foregoing reasons, we AFFIRM.

Footnotes

¹Although the SCRA does not define “default judgment,” see § 3911 (“Definitions”), the phrase is generally understood as distinct from “judgment.” “Default judgment” generally means “a judgment entered by the Court as a penalty against a party for failure to appear or otherwise to perform a procedurally required act.” *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 174 n.3 (3d Cir. 1990) (citation and internal quotation marks omitted); see also FED. R. CIV. P. 55(a) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.”).

²Appellants do not argue that the confessions of judgment are invalid based on a law other than the SCRA.

³The court need not address Appellees’ additional and alternative arguments in support of the dismissal of Appellants’ claims.

8a

4/4/2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 18-0386
JUDGE S. MAURICE HICKS, JR.
MAGISTRATE JUDGE HORNSBY

STEVEN D. FODGE, ET AL.

VERSUS

TRUSTMARK NATIONAL BANK, ET AL.

MEMORANDUM RULING

Before the Court is Defendant Trustmark National Bank's ("Trustmark") Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). See Record Document 140. Plaintiffs Steven D. Fodge ("Fodge"), Joseph E. Carey, Jon A. Tokay, Pamela R. Jeffcoat, Andrew J. Kaltenmark, Lance K. Inovejas and Deborah A. Inovejas (collectively "Plaintiffs") have filed a response. See Record Document 143.

On March 18, 2019, this Court issued an order granting several motions to dismiss filed by the other defendants in this matter and dismissed all of Plaintiffs' claims, except for Fodge's claims against Trustmark, which was the only defendant that did not file a motion to dismiss. See Record Document 138 at 1 n.1. Subsequently, Trustmark filed the instant Motion for Judgment on the Pleadings requesting that Fodge's claims against it also be dismissed since they are nearly

identical to the previously dismissed claims against the other defendants, which Plaintiffs do not dispute. See Record Document 141 at 3; Record Document 143 at 1. Additionally, while Plaintiffs note their opposition to the merits of Fodge's motion, as well as the Court's previous ruling referenced above, see Record Document 143 at 2, they "suggest that expeditious granting of [Trustmark's] motion . . . would place the case in the correct procedural posture for an appeal." Id.

Therefore, based on the foregoing reasons, Trustmark's Motion for Judgment on the Pleadings (Record Document 140) is **GRANTED** and all of Fodge's claims are hereby **DISMISSED WITH PREJUDICE**.

A judgment consistent with the terms of the instant Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 4th day of April, 2019.

JUDGE S. MAURICE HICKS, JR.
UNITED STATES DISTRICT COURT

10a

2019 WL 1245802

Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Shreveport Division.

Steven D. FODGE, et al.

v.

TRUSTMARK NATIONAL BANK, et al.

CIVIL ACTION NO. 18-0386

Signed 03/18/2019

Attorneys and Law Firms

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MEMORANDUM RULING

S. MAURICE HICKS, JR., CHIEF JUDGE

Before the Court are multiple pending Motions to Dismiss filed by Defendants Barksdale Federal Credit Union (“Barksdale”), Bank of America, N.A. (“Bank of America”), Ocwen Loan Servicing, LLC (“Ocwen”), PennyMac Loan Services, LLC (“PennyMac”), and PHH Mortgage Corporation (“PHH”) (collectively “Defendants”) pursuant to Federal Rule of Civil Procedure 12(b)(6). See Record Documents 85, 94, 95, 99, and 100. There is also pending a Motion to Strike filed by Defendant Bank of America. See Record Document 96. Plaintiffs Steven D. Fodge (“Fodge”), Joseph E. Carey (“Carey”), Jon A. Tokay (“Tokay”), Pamela R. Jeffcoat (“Jeffcoat”), Andrew J. Kaltenmark (“Kaltenmark”), Lance K. Inovejas and Deborah A. Inovejas (the “Inovejas”) (collectively “Plaintiffs”) oppose the motions. See Record Documents 116, 119, 120, 121, 122, and 125.1 Defendants seek dismissal of all of Plaintiffs' claims. For the

reasons set forth below, Defendants' Motions to Dismiss are hereby GRANTED. Additionally, Bank of America's Motion to Strike is DENIED AS MOOT.

I. BACKGROUND

Plaintiffs in this action are five individuals and one married couple who allege that they separately entered into mortgage agreements with six separate lenders and were later foreclosed on through Louisiana's executory process procedure in Louisiana state courts. See Record Document 84 at 2–3, 5–6. Plaintiffs allege that they were on active duty with various branches of the military at the relevant times and that the foreclosures violated provisions of the Servicemembers Civil Relief Act (“SCRA”), 50 U.S.C. §§ 3901 et seq., which provides protections against, inter alia, default judgments absent a waiver that meets certain requirements. See *id.*

Plaintiffs also pray for certification of a state-wide class of servicemembers who, like themselves, obtained mortgage-secured loans, did not sign valid waivers acceptable under the SCRA, and who were foreclosed upon by Louisiana executory process while in active military service, as defined by the Act. See *id.* at 5–6, 24–25.² Plaintiffs seek damages in addition to declaratory and injunctive relief on behalf of a class that they estimate numbers in the thousands. *Id.* at 25, 28.

^{*2} Defendants responded to the complaint by each filing a motion to dismiss; additionally, a motion to sever and a motion to strike were filed by Ocwen and Bank of America, respectively. See Record Documents 86 and 96. Defendants make similar arguments against Plaintiffs' suit, including their assertions that the

SCRA does not apply to Louisiana executory process proceedings and that the SCRA did not render invalid the confession of judgment provisions contained in Plaintiffs' mortgage agreements. See Record Document 137 at 1–2. Several defendants also raise arguments specific to certain plaintiffs, such as bankruptcy estoppel or a challenge to whether a plaintiff was on active duty within the meaning of the SCRA at the relevant time. See *id.*

In addition, a Motion to Sever was filed by Ocwen, as well as several Motions to Stay that were filed by Ocwen, PennyMac, and Bank of America. See Record Documents 86, 97, and 105. Thereafter, on November 19, 2018, Magistrate Judge Hornsby, upon consideration of the motions to stay, entered an order staying the requirement of exchanging initial disclosures, discovery, and the class certification process pending the Court's ruling on the instant Motions to Dismiss and Motion to Strike. See Record Document 137 at 3.

II. LAW AND ANALYSIS

A. Pleading and 12(b)(6) Motion to Dismiss Standards

Rule 8(a)(2) of the Federal Rules of Civil Procedure governs the requirements for pleadings that state a claim for relief, requiring that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” The standard for the adequacy of complaints under Rule 8(a)(2) is now a “plausibility” standard found in *Bell Atlantic Corp. v. Twombly* and its progeny. 550 U.S. 544, 127 S. Ct. 1955 (2007). Under this standard, “factual allegations must be enough to raise a right to relief above the

speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555–56, 127 S. Ct. at 1965. If a pleading only contains “labels and conclusions” and “a formulaic recitation of the elements of a cause of action,” the pleading does not meet the standards of Rule 8(a)(2). *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citation omitted).

Federal Rule of Civil Procedure 12(b)(6) allows parties to seek dismissal of a party's pleading for failure to state a claim upon which relief may be granted. In deciding a Rule 12(b)(6) motion to dismiss, a court generally may not “go outside the pleadings.” *Colle v. Brazos Cty., Tex.*, 981 F.2d 237, 243 (5th Cir. 1993). However, a court may rely upon “documents incorporated into the complaint by reference and matters of which a court may take judicial notice” in deciding a motion to dismiss. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008).³ Additionally, courts must accept all factual allegations in the complaint as true. See *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. However, courts do not have to accept legal conclusions as facts. See *id.* A court does not evaluate a plaintiff's likelihood for success, but instead determines whether a plaintiff has pleaded a legally cognizable claim. See *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). Courts considering a motion to dismiss under Rule 12(b)(6) are only obligated to allow those complaints that are facially plausible under the *Iqbal* and *Twombly* standard to survive such a motion. See *Iqbal*, 556 U.S. at 678–79, 129 S. Ct. at 1949. If the complaint does not meet this standard, it can be dismissed for failure to state a claim upon which relief can be granted. See *id.* Such a dismissal ends the case “at the point of minimum

expenditure of time and money by the parties and the court.” Twombly, 550 U.S. at 558, 127 S. Ct. at 1966.

B. Applicability of SCRA Section 3931 to Louisiana Executory Process Proceedings

Although Plaintiffs bring this action pursuant to the SCRA, their arguments in support of their claims rely primarily on two of the Act's provisions, specifically Sections 3931 and 3918. See Record Document 84 at 27. The Court first addresses their argument relating to Section 3931, which is titled “Protection of servicemembers against default judgments.” 50 U.S.C. § 3931. Plaintiffs make several assertions pursuant to this section, specifically that Defendants' use of Louisiana's executory process procedure to foreclose on Plaintiffs' mortgages constituted “default judgments” in violation of the provision. See Record Document 84 at 7.4

Section 3931, which “applies to any civil action or proceeding ... in which the defendant does not make an appearance,” 50 U.S.C. § 3931(a), provides various protections to servicemembers (as defined under the SCRA)⁵ by imposing certain requirements on courts and plaintiff-creditors before default judgments can be entered against them. These protections include, inter alia, requirements that plaintiffs file an affidavit stating whether or not the servicemember is in military service before entering judgment, that courts appoint an attorney to represent the servicemember (if shown to be in military service) before entering judgment, and that courts (if such courts entered a default judgment against a servicemember) reopen the judgment to allow the servicemember to defend the action if he was “materially affected by reason of that military service

in making a defense to the action” and “has a meritorious or legal defense to the action or some part of it.” See 50 U.S.C. § 3931(b)(1)–(2), (g)(1).

Louisiana law defines executory proceedings as “those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.” See La. C.C.P. art. 2631 (emphasis added). Executory process is a commonly-used procedure in Louisiana in which a debtor, in executing the mortgage, agrees in advance (i.e., “confesses judgment”) to allow a mortgagee, or creditor, to foreclose on the property that is subject to the mortgage if the debtor later defaults in making his mortgage payments under the loan agreement. See Record Document 95-1 at 12–13; Record Document 84 at 3. This procedure is an *in rem* proceeding and so does not result in a personal judgment against the debtor, and the debtor is not required to be served with citation or service of demand for payment. See La. C.C.P. art. 2640; see also *Mitchell v. Valteau*, 09-1095 (La. App. 4th Cir. 1/27/10), 30 So. 3d 1108, 1112–13.

In this case, the Court finds that Defendants' use of Louisiana's executory process procedure to foreclose on Plaintiffs' mortgages is not the type of action to which Section 3931 is meant to apply. Although it appears no court has addressed the specific question of Section 3931's applicability to Louisiana executory proceedings, courts have addressed this question in the context of analogous proceedings in other states. For example, courts applying the SCRA to cognovit judgments, which are similar to the confession of judgment provisions used in Louisiana executory proceedings, have held that Section 3931 “does not

apply to cognovit judgments because by their very nature cognovit judgments do not require an appearance by the debtor, since the debtor has consented in advance to the holder obtaining judgment without notice or a hearing.” See *Fifth Third Bank v. Schoessler's Supply Room*, 940 N.E.2d 608, 614 (Ohio Ct. App. 2010); *Ross v. Brown Title Corp.*, 356 F. Supp. 595, 600 (E.D. La. 1973) (noting that executory process is “akin to the common law cognovit procedures” and “confessions of judgment”); see also *Cmty. Church of Ashburn v. Harbor View Contractors*, No. 10-0121, 2010 WL 4284950, at *2 (D. Md. Oct. 28, 2010) (holding that the SCRA does not apply to “judgments by confession”).

The decision in *Fifth Third Bank v. Schoessler's Supply Room*, 940 N.E.2d 608, 614 (Ohio Ct. App. 2010), is insightful. The court there, in concluding that Section 3931's protections are not meant to apply to cognovit judgments, noted that the intent of the SCRA “is to protect servicemembers from having judgments obtained against them[] because their military service prevents them from being available to appear in court.” *Id.* at 614 (citing *U.S. v. Kaufman*, 453 F.2d 306, 308–09 (2d Cir. 1971) (stating that the SCRA's purpose “is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves”)); see also *Taurus Leasing Corp. v. Chalaire*, 400 So. 2d 303, 305 (La. App. 4th Cir. 1981) (concluding that the Act “is not intended to grant immunity to a mortgagor from liability, but rather to establish safeguards to protect members of the military during their absence”).

Here, Plaintiffs do not contest the similarities between cognovit judgments and confession of

judgment provisions; instead, they attempt to distinguish the above-referenced cases by arguing that the courts in those cases did not consider whether the cognovit judgments were valid to begin with. See Record Document 116 at 11; Record Document 120 at 11 n.4. In fact, Plaintiffs' primary argument in their briefs is that Defendants could not have legally used Louisiana's executory process method for the instant foreclosures because none of the mortgages contained a valid confession of judgment. See Record Document 121 at 16. Plaintiffs' arguments regarding this issue are discussed below in Section II.C., *infra*.

While the SCRA is meant to be interpreted liberally to protect servicemembers,⁶ the Court declines to hold that its protections against default judgments somehow operate to invalidate legal foreclosures completed through Louisiana's executory process method, a procedure that does not require service thereon or an appearance by the servicemember-debtor. See La. C.C.P. arts. 2631 and 2640; see also *Cnty. Church of Ashburn v. Harbor View Contractors*, No. 10-0121, 2010 WL 4284950, at *2 n.5 (citing *Arthur v. Gardner*, 1942 WL 2541, at *1 (Pa. Com. Pl. 1941) (stating that Act does not require an affidavit for a judgment by confession because that is “not a default of any appearance by the defendant, but a default in payment”)); *Fifth Third Bank*, 940 N.E.2d at 615 (“Because the applicable provisions of the SCRA are there to protect servicemembers whose obligations prohibit them from making an appearance and defending actions, it is clear that the protections are available only for default judgments and not cognovit judgments.”). Therefore, because Section 3931—the only door through which Plaintiffs' case can proceed—is

not applicable to their claims, Plaintiffs' claims must be dismissed.

C. Validity of the Confession of Judgment Provisions

In addition to their argument regarding Section 3931's applicability to Louisiana's executory process procedure, Plaintiffs assert their related contention that all of the confession of judgment provisions imported with their mortgage agreements were never valid in the first place. See Record Document 120 at 11. The corollary of this argument, according to Plaintiffs, is that because none of the Defendants had valid confessions of judgment, the only foreclosure method available to them was an ordinary lawsuit to which Section 3931's protections against default judgments would then apply, thereby forming the basis of their claims pursuant to that section. See Record Document 121 at 16. However, in relying on this argument, Plaintiffs effectively concede their initial argument discussed above that Section 3931 applies to Louisiana executory proceedings. See *id.* (“[Bank of America's] Memo argues that Section 3931 does not apply to proceedings enforcing confessions of judgments. Plaintiffs agree 100%, as long as there is a valid confession of judgment....”) (emphasis added).

Like their argument regarding Section 3931's applicability to Louisiana executory process proceedings, Plaintiffs' additional argument is also without merit. First, the sole basis on which Plaintiffs rely in arguing that Defendants lacked valid confessions of judgment is their theory that Section 3918 of the SCRA, which governs the process by which servicemembers can waive protections under the Act, somehow rendered the confession of judgment

provisions invalid for failing to comply with that section's requirements. See, e.g., Record Document 120 at 11 n.4. However, nowhere in their numerous opposition briefs filed with the Court do Plaintiffs cite to any authority, whether based on Louisiana law⁷ or otherwise, providing that confession of judgment provisions (and/or cognovit judgments) are required to comply with any of the requirements listed in Section 3918, or that their failure to do so has the effect of rendering such provisions invalid.

Furthermore, because the Court has already concluded above that Section 3931 is not applicable to Louisiana executory process proceedings, Plaintiffs did not possess any “rights” under that section that they could have waived to begin with. See *Pailet v. Ald, Inc.*, 194 So. 2d 420, 423 (La. App. 4th Cir. 1967). Therefore, Section 3918 was not implicated when Plaintiffs executed their mortgages importing the confession of judgment provisions and thus no waiver pursuant to that section was required in order to effectuate the foreclosures at issue.

III. CONCLUSION

The Court finds that Plaintiffs in this case have failed to assert a legally cognizable claim under the SCRA. Therefore, based on the foregoing reasons, Defendants' Motions to Dismiss (Record Documents 85, 94, 95, 99, and 100) are GRANTED and all of Plaintiffs' claims are hereby DISMISSED WITH PREJUDICE.⁸ Additionally, Bank of America's Motion to Strike (Record Document 96) is DENIED AS MOOT.

An order consistent with the terms of the instant Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 18th day of March, 2019.

Footnotes

¹Defendant Trustmark National Bank (“Trustmark”), against whom Plaintiff Fodge has filed several claims, is the only defendant who has not filed a motion to dismiss and has only filed an answer in response to Plaintiffs' complaint. See Record Document 114. Therefore, Fodge's claims against Trustmark are not at issue for purposes of the instant Memorandum Ruling.

²“Military service,” for servicemembers who are members of the Army, Navy, Air Force, Marine Corps, or Coast Guard, is “active duty,” as defined in 10 U.S.C. § 101(d)(1). 50 U.S.C. § 3911(2)(A)(i). Plaintiff Carey and Defendant Ocwen make arguments in portions of their briefs as to whether the SCRA's protections applied at all to Carey, whose military orders show that he was on active duty for the Louisiana National Guard, which is not listed as covered by the SCRA. See Record Document 85-1 at 4–5; Record Document 116 at 6. However, because it is not necessary for the Court to answer this question in order to resolve the instant motions, this issue is not addressed.

³The Court also notes that while its review of a Rule 12(b)(6) motion to dismiss is generally limited to the plaintiff's complaint, documents attached by a defendant are properly considered “if they are referred to in the plaintiff's complaint and are central to her claim,” and “[i]n so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated.” *Carter v. Target*

Corp., 541 F. App'x 413, 416–17 (5th Cir. 2013) (citations omitted) (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)).

4Because the dispositive facts alleged in the First Amended Class Action Complaint, see Record Document 84, are nearly identical with respect to each individual Plaintiff, the Court's findings and reasoning apply with equal force to all Plaintiffs for purposes of the instant Memorandum Ruling.

5See *supra* note 2.

6Engstrom v. First Nat. Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir. 1995) (noting, however, that “although the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims”).

7The Court also notes that nowhere do Plaintiffs argue that the confessions of judgment in this case did not comply with Louisiana law.

8Because the Court concludes that Plaintiffs have failed to state a claim upon which relief may be granted, Plaintiffs' ancillary claims for declaratory and injunctive relief are likewise dismissed. See Record Document 84 at 29.

Date Filed: 01/30/2020
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30279

STEVEN D. FODGE, Individually and as
representative on behalf of all similarly situated
persons; JOSEPH E. CAREY, Individually and as
representative on behalf of all similarly situated
persons; JON A. TOKAY, Individually and as
representative on behalf of all similarly situated
persons; PAMELA R. JEFFCOAT, Individually and as
representative on behalf of all similarly situated
persons; ANDREW J. KALTENMARK, Individually
and as representative on behalf of all similarly situated
persons; LANCE K. INOVEJAS, Individually and as
representative on behalf of all similarly situated
persons; DEBORAH A. INOVEJAS, Individually and
as representative on behalf of all similarly situated
persons,

Plaintiffs - Appellants

v.

TRUSTMARK NATIONAL BANK; OCWEN LOAN
SERVICING, L.L.C.; BARKSDALE FEDERAL
CREDIT UNION; PENNYMAC LOAN SERVICES,
L.L.C.; BANK OF AMERICA, N.A.; P H H
MORTGAGE CORPORATION,
Defendants - Appellees

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

Before KING, GRAVES, and WILLETT, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is
DENIED.

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

UNITED STATES CIRCUIT JUDGE