No. 16-902

In the Supreme Court of the United States

REGINALD JONES,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Russell J. Pope
Counsel of Record
TREANOR POPE & HUGHES, P.A.
500 York Road
Towson, Maryland 21204
(410) 494-7777
rjpope@tph-law.com

Attorneys for Respondent Wells Fargo Bank, N.A.

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether Petitioner Reginald Jones waived his arguments against the doctrine of res judicata barring the Complaint in the U.S. Court of Appeals for the Fourth Circuit, and if not, whether this Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.* created an exception to the application of res judicata to long-resolved judgments.

RULE 29.6 CORPORATE DISCLOSURE

Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Company. Wells Fargo & Company's shares are traded on the New York Stock Exchange under the symbol WFC. Berkshire Hathaway Inc. is a publicly held corporation that owns 10% or more of Wells Fargo & Company's stock.

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STATEMENT OF THE CASE

On May 6, 2005, Petitioner Reginald Jones ("Petitioner" or "Mr. Jones") refinanced the mortgage (the "Mortgage") on the real property located at 10214 Silver Bell Terrace, Rockville, Maryland 20850 (the "Property"). Wells Fargo Bank, N.A. ("Wells Fargo") serviced the Mortgage. After defaulting on his Mortgage obligations, Mr. Jones claims to have written a letter to Wells Fargo on April 15, 2008, attempting to rescind the Mortgage pursuant to the Truth in Lending Act ("TILA"). *See* 15 U.S.C. § 1635(a), (f). However, Mr. Jones took no further action to rescind the Mortgage until this litigation, over seven years later.

A foreclosure action was filed in regard to Mr. Jones' defaulted Mortgage in the Circuit Court for Montgomery County, Maryland on July 10, 2009 (the "Foreclosure Action"). Mr. Jones participated in and raised several objections to the Foreclosure Action, but he was unsuccessful. The Property was sold to third-party purchasers (who are not parties to this case) on October 7, 2009, and the sale was ratified on March 2, 2010. Under Maryland law, the sale ratification was a final judgment for the purposes of res judicata. *See Manigan v. Burson*, 862 A.2d 1037, 1041-42 (Md. Ct. Spec. App. 2004). For purposes of this case, Mr. Jones never raised his putative TILA rescission as a claim or defense in the Foreclosure Action.

Mr. Jones filed his first lawsuit against Wells Fargo relating to the Mortgage in the Circuit Court for Montgomery County on October 6, 2009, and the case was removed to the U.S. District Court for the District of Maryland. *See Jones v. HSBC Bank USA, N.A.*, Case No. RWT 09CV2904, 2011 WL 382371, at *1 (D. Md.

Feb. 3, 2011), *aff'd*, 444 Fed. Appx. 640 (4th Cir. 2011) [hereinafter "*Jones I* "]. In *Jones I*, the Petitioner alleged that the Mortgage was invalid, he sought damages, and he attempted to enjoin the Foreclosure Action. As in the Foreclosure Action itself, and as relates to this case, Mr. Jones neglected to raise a TILA rescission claim in *Jones I*.

The U.S. District Court dismissed *Jones I* with prejudice on February 3, 2011 on the basis of res judicata and collateral estoppel. App. to Pet. at p. 7a. The District Court found that the ratification of the foreclosure sale of the Property was a final judgment, and therefore the *Jones I* Complaint impermissibly attempted to raise claims that were or could have been litigated previously in the Foreclosure Action. Mr. Jones appealed the dismissal of *Jones I* to the U.S. Court of Appeals for the Fourth Circuit (the "Fourth Circuit"), which affirmed that the doctrine of res judicata barred the Complaint. 444 Fed. Appx. 640 (4th Cir. 2011).

This case began on December 10, 2015, when Mr. Jones filed this second lawsuit against Wells Fargo, which it again removed to the U.S. District Court for the District of Maryland [hereinafter "*Jones II* "]. His sole claim for relief in *Jones II* was a rescission of the Mortgage pursuant to TILA, 15 U.S.C. § 1635. However, the two prior final judgments (in the Foreclosure Action and *Jones I*) coupled with his failure to previously raise any TILA rescission claims caused the District Court to dismiss Mr. Jones' "third try," again on the basis of res judicata. App. to Pet. at p. 5a.

In the District Court below, Mr. Jones posited that *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015) changed the law regarding TILA rescissions, and such a change supposedly voided the final judgment in the Foreclosure Action. App. to Pet. at p. 5a. However, the U.S. District Court found that even if *Jesinoski* did effectuate a change in law, " 'a change in case law almost never warrants an exception to the application of res judicata.' " *Id.* (quoting *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 211 (4th Cir. 2013)). "Nothing in *Jesinoski* entitles Jones to a third try." *Id.*

The Petitioner appealed the dismissal of the Complaint in *Jones II* to the Fourth Circuit Court of Appeals. Contrary to Mr. Jones' claim in his Petition for Writ of Certiorari (the "Petition"), the Fourth Circuit did not hold that "*res judicata* bars Petitioner from seeking the protection afforded by [TILA] because [a] final foreclosure judgment was entered." Pet. at p. i. Rather, the Circuit Court held only that Mr. Jones failed to properly preserve and present the issue of res judicata on appeal. As a result, the Fourth Circuit concluded that he "abandoned his claim that the district court erred" in applying res judicata to his Complaint. App. to Pet. at p. 2a.

Mr. Jones filed the Petition to this Court on January 13, 2017. Despite his prior abandonment of the issue, he now asks the Court to consider whether his TILA claims create an exception to the preclusive effect of res judicata. *See* Pet. at p. i.

SUMMARY OF THE ARGUMENT

This Court should deny the Petition because Mr. Jones waived and abandoned in the Fourth Circuit the question of whether res judicata bars his Complaint, the central issue in his question presented for review. However, even if the Court were to overlook his abandonment of the claim, Mr. Jones has not presented a compelling reason to grant certiorari, per Supreme Court Rule 10. He has not identified any decisions by the U.S. Courts of Appeals or state courts of last resort that conflict with one another. Indeed, the U.S. Courts of Appeals uniformly agree that res judicata bars post-*Jesinoski* TILA rescission claims that are subject to a prior final judgment.

Additionally, neither of the lower court decisions in this case conflict with *Jesinoski*. Finally, Mr. Jones fails to identify an important federal question that justifies the attention of the Supreme Court of the United States.

ARGUMENT

A. Mr. Jones Waived and Abandoned His Arguments against Res Judicata.

The Petitioner has not preserved his arguments against the application of res judicata to his TILA rescission claims, because he waived and abandoned them in the Fourth Circuit Court of Appeals. There, in its opposing brief, Wells Fargo argued that Mr. Jones waived his arguments against res judicata. Surprisingly, Mr. Jones elected not to even address this argument and did not file a Reply Brief. Instead, he waited until presentation of his Petition to this Court to oppose the waiver argument for the first time. The

Fourth Circuit correctly concluded that Mr. Jones "has not challenged the district court's determination that the doctrine of res judicata bars his claim," and that he "abandoned his claim that the district court erred" in applying res judicata to this case. App. to Pet. at p. 2a. Accordingly, Mr. Jones' arguments against res judicata were not preserved and are not properly presented to this Court.

Further, in his Petition Mr. Jones argues for the first time that "[*r*]*es judicata* is inapplicable to a void foreclosure judgment," that his TILA rescission claim "would have been foreclosed by [Fourth] Circuit precedent," and that Maryland law permits revision of an "illegal" ratification of a foreclosure sale. *See* Pet. at pp. 18-20. However, new arguments cannot be raised for the first time in a Petition for Certiorari. *See United States v. Jones*, 132 S. Ct. 945, 954 (2012) (stating that an argument raised for the first time in the Supreme Court may be forfeited); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007) ("[T]he lower court did not consider the claims, and we decline to reach them in the first instance."). For this reason alone, the Petition should be denied.

B. Mr. Jones Has Not Presented Any Compelling Reasons to Grant his Petition Pursuant to Supreme Court Rule 10.

Even assuming that the issue of res judicata in this case had not been abandoned and is properly before the Court (which it is not), Mr. Jones has not presented any "compelling reasons" to grant his Petition, as required by Supreme Court Rule 10.

1. Mr. Jones Has Not Identified a Division between Relevant Judicial Decisions Related to his TILA Rescission Claims.

First, Mr. Jones has not demonstrated a split of authority between the U.S. Courts of Appeals, state courts of last resort, or both. *See* S. Ct. R. 10(a)-(b). The Petition does not even cite to a single Court of Appeals or highest state court opinion. Instead, Mr. Jones relies on U.S. District Court cases, U.S. Bankruptcy Court cases, and one California intermediate appellate court opinion. *See* Pet. at pp. 16-17, 22. This reliance falls short of the mandate of Rule 10.

To the extent that the Courts of Appeals have considered res judicata since *Jesinoski*, they have uniformly held that res judicata bars TILA rescission claims that attempt to void a prior final foreclosure judgment. *See, e.g.*, *GMAC Mortgage, LLC v. McKeever,* 651 Fed. Appx. 332, 343-44 (6th Cir. June 2, 2016), *cert. denied*, Case No. 16-591 (Jan. 9, 2017) (affirming dismissal of plaintiff's TILA claim on the basis of res judicata after *Jesinoski* because "the principles of claim preclusion apply 'even if an intervening decision effects a change in the law which bears directly on the legal theory advanced in the second suit' "); *Kirby v. OCWEN Loan Servicing, LLC*, 641 Fed. Appx. 808, 812-13 (10th Cir. Feb. 5, 2016), *cert denied*, 137 S. Ct. 336 (2016) (stating that "*Jesinoski* has no bearing on whether Appellants could have brought the TILA claims during the First Suit"). Moreover, the Tenth Circuit concluded that *Jesinoski* "does not constitute an intervening change" of law to TILA rescissions. *Kirby*, 641 Fed.

Appx. at 813. Thus, there is no conflict in case law that requires rectification.

2. The Decisions Below Do Not Conflict with Relevant Decisions of this Court.

Second, Mr. Jones has not presented a "compelling reason" to grant certiorari because neither the lower court decisions nor his unpreserved arguments regarding res judicata "conflict" with *Jesinoski* or other "relevant decisions of this Court." *See* S. Ct. R. 10(c).

Although Mr. Jones claims *Jesinoski* held that a mortgage is "void upon mailing of the rescission," the actual issue in that case was much narrower. This Court stated that the "question presented is whether a borrower exercises [the right to rescind certain loans pursuant to TILA] by providing written notice to his lender, or whether he must also file a lawsuit before the 3-year period elapses." *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 791 (2015). This Court held that "so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years." *Id.* at 792.

Mr. Jones attempts to stretch this limited holding to support his broader claim that rescission occurs by "operation of law" with nothing more. *See* Pet. at p. 13. But *Jesinoski* merely addressed TILA's rescission-notice requirements, not how to successfully unwind a complex mortgage loan and restore the *status quo ante*. Most important, for present purposes, is that *Jesinoski* says absolutely nothing about the preclusive effect of res judicata.

Even if *Jesinoski* had changed TILA rescission law, the U.S. District Court concluded that a change in law generally does not warrant an exception to the doctrine of res judicata. This conclusion is consistent with this Court's precedent. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have . . . rested on a legal principle subsequently overruled in another case."). The Petitioner fails to present a meaningful justification for creating an exception here to this well-settled principle of law.

3. The Courts Below Did Not Decide an Important Question of Federal Law.

Assuming that Mr. Jones had preserved his ability to object to the U.S. District Court's conclusion that his TILA rescission claims are barred by res judicata, his situation does not present an important question of federal law. The Petition presents no evidence to indicate that his unpreserved issue—whether after *Jesinoski*, the doctrine of res judicata precludes TILA rescission claims that seek to void a prior final judgment—is frequently litigated, is consuming substantial judicial resources, or affects a large number of borrowers or lenders. The dearth of decisions by state courts of last resort and federal Courts of Appeals, let alone a split between them, further reveals the limited impact of Mr. Jones' Petition except to the narrow circumstances of his own case. Therefore, the Petition does not identify any important federal question that requires the attention of the Supreme Court of the United States.

CONCLUSION

For all the reasons set forth above, Wells Fargo requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Russell J. Pope
Counsel of Record
TREANOR POPE & HUGHES, P.A.
500 York Road
Towson, Maryland 21204
(410) 494-7777
rjpope@tph-law.com

Attorneys for Respondent,
Wells Fargo Bank, N.A.