By David Cox

Incessant Assessments

Post-Petition HOA Dues for Surrendered Real Property Should Be Discharged in Chapter 13

David Cox
Cox Law Group
Lynchburg, Va.

David Cox practices bankruptcy law throughout the Western District of Virginia and previously served as a judicial law clerk for the late Hon. William E. Anderson. He is a co-editor of Bankruptcy Practice in Virginia *and a permanent member of the Fourth Circuit Judicial Conference.*

Courts have split on the application of § 523(a)(16) and the issue of whether post-petition homeowner's association (HOA) fees and assessments are dischargeable under § 1328(a) in a chapter 13 case with surrendered real estate. The determination of this issue not only governs the extent of a debtor's fresh start, it also impacts the feasibility of the debtor's plan and even the practicality of chapter 13 as an option for the struggling homeowner.

Chapter 7 debtors know all too well the problem with surrendering homes that are subject to costly HOA dues. In a footnote to his opinion in *In re Pigg*, Hon. George C. Paine explained that "[w]hile the HOA fees continue to accrue against the debtor, the Bank is de-incentivized to take any action. The economics of the situation allow the Bank to sit idle and not foreclose as long as the debtor, not the Bank, is liable for the HOA fees."[1]

Unfortunately, this lack of incentive on the lienholder's part to foreclose is no different in chapter 13. Many debtors who are burdened by homes they can no longer afford and that seek the shelter of a chapter 13 plan to surrender their property interests are finding that their mortgage lenders might be painfully slow to foreclose. Insult is added to injury when debtors find themselves both saddled with the burden of what have become known as "zombie homes" and facing post-post-petition collections when they simply attempt to reorganize in good faith under chapter 13. This article examines claims for HOA dues for debtors' homes assessed post-petition and argues that such debts are discharged by completed chapter 13 plans providing for the surrender of those homes.

Ongoing HOA Dues and Assessments Are Pre-Petition Debts Subject to Discharge

A discharge under § 1328(a) discharges the debtor from "all debts," with the exception of certain debts enumerated in the statute. Under the Bankruptcy Code, "debt" is defined as a "liability on a claim," and a "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[2] By design, Congress gave these terms the broadest-possible definitions in order to permit debtors to deal with all legal obligations in bankruptcy.[3]

In the case of an HOA, its claim arises by virtue of debtors acquiring title to real estate pre-petition. Ongoing assessments are a "consequence of, and mature from, the act that gave rise to such claim."[4] HOA obligations are a pre-petition claim because they arose upon the debtor taking title of the property, which occurred pre-petition, and absent a debtor's pre-petition act of taking title, the HOA would not have a claim.[5] Ongoing post-petition assessments "are merely the 'contingent,' 'unmatured' portion of that pre-petition claim.'"[6] Although future assessments are contingent, unmatured, unliquidated and unfixed debts, they are still debts that will be discharged upon entry of the court's discharge order.[7]

Congress endorsed this premise by its description of post-petition HOA assessments as "debts" in the text of § 523(a)(16). Debtors faced with mounting dues and assessments understand how their obligations to the HOA fall squarely within the Bankruptcy Code's definition of a "pre-petition debt." The obligation arises from a right to payment that requires the debtors to pay the HOA any assessments that might become due, depending on future events such as whether they continue to own the property and whether assessments are actually levied. As such, the post-petition HOA dues and assessments are contingent debts that should be included in a discharge.[8]

Ongoing HOA Assessments Are Dischargeable in Chapter 13

The cases following the contrary view, that HOA liabilities are post-petition debts not included in a debtor's discharge, are inconsistent with the clear language of § 523(a)(16). Congress effectively

1 *In re Pigg*, 453 B.R. 728, 732 (Bankr. M.D. Tenn. 2011).

2 *See* § 101(12) and (5).
3 *Pennsylvania DPW v. Davenport*, 495 U.S. 552, 558 (1990).
4 *In re Coonfield*, 517 B.R. 239, 242 (Bankr. E.D. Wash. 2014).
5 *Id.* at 243.
6 *Id.* (quoting *In re Hawk*, 314 B.R. 312, 316 (Bankr. D. N.J. 2004)).
7 *In re Rosteck*, 899 F.2d 694, 697 (7th Cir. 1990).
8 *Id.* at 696.

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acknowledged that ongoing HOA assessments would otherwise be dischargeable pre-petition debts but for the exception of § 523(a)(16) that it included as part of the Bankruptcy Reform Act of 1994. Section 523(a)(16) identifies post-petition HOA dues as an exception to chapter 7 and hardship chapter 13 discharges by removing from the ambit of those discharges "any debt for a fee or assessment that becomes due and payable after the order for relief" to an HOA.

If Congress had believed that ongoing HOA assessments were post-petition debts not included in a bankruptcy discharge, then it would not have needed the special exception to discharge it added with § 523(a)(16). Section 523(a)(16) would be superfluous and "rendered meaningless," as it would simply restate "a principle already infused in bankruptcy law; *i.e.*, that a right to payment arising post-petition is not subject to discharge."[9]

Although § 523(a)(16) ensures that chapter 7 and hardship chapter 13 discharges do not include post-petition HOA assessments, that discharge exception is inapplicable to a chapter 13 discharge under § 1328(a) when the debtor completes all payments under the chapter 13 plan. Even with the limitations on the chapter 13 super-discharge imposed by Congress with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, post-petition HOA dues under § 523(a)(16) nonetheless remain part of the discharge of § 1328(a). Had Congress sought to except ongoing association debts from discharge, no matter the chapter, it would have simply included § 523(a)(16) as one of the exceptions to discharge under § 1328(a). Congress chose not to do so, and the result encourages debtors to seek relief under chapter 13's broad super-discharge.

Equities Favor Inclusion of Ongoing HOA Assessments in Chapter 13 Discharges

A debtor surrendering and vacating real estate subject to an HOA realizes no benefits of the HOA services that are otherwise enjoyed by their neighbors. Further, debtors have no control over the disposition of their surrendered real estate in chapter 13, particularly in light of the growing case law that declines to permit a debtor to re-vest surrendered property in the lienholder. In contrast, HOAs often retain more control of the disposition of the property in that many state laws permit HOAs to initiate foreclosures to the extent that unpaid assessments attach as liens to the surrendered property.

> **Debtors are denied a true fresh start when they surrender real estate in a bankruptcy yet continue to incur ongoing and growing post-petition HOA dues.**

Including post-petition HOA debts within the super-discharge of chapter 13 promotes the utilization of chapter 13 by debtors, which is consistent with congressional policy favoring its selection by individual consumer debtors. In addition, as a practical matter, without the debtor left on the hook for post-petition HOA dues, the HOA and any mortgage lender will be further motivated to promptly exercise any rights it might have as a lienholder against the property, reducing the delays many debtors face in transferring the title to real estate they are surrendering in bankruptcy.

Courts should construe any discharge exceptions narrowly and in favor of the debtor in order to implement the Bankruptcy Code's purpose of giving a debtor a new beginning and a fresh start.[10] Debtors are denied a true fresh start when they surrender real estate in a bankruptcy yet continue to incur ongoing and growing post-petition HOA dues. In addition to the overwhelming equities favoring the debtor, the plain reading of §§ 1328(a) and 523(a)(16) should absolve chapter 13 debtors of this costly problem upon the completion of their full plan payments and their receipt of a discharge. abi

9 *Coonfield* at 243.

10 *In re Bonnanzio*, 91 F.3d 296, 300 (2d Cir. 1996).