Questions frequently arise as to the nature of claims for condominium, co-op, and homeowner’s association (HOA) dues and assessments and their treatment in bankruptcy. Anyone who handles consumer bankruptcy cases should at least be familiar with the basics: how to schedule interests and claims, treatment of claims, and dischargeability issues. In addition, the present economy, coupled with dischargeability issues, has created a kind of gridlock in the disposition of units which is a major problem for community associations, owners, and lenders alike. The problem of dealing with this gridlock has become all too common and, in a given case, can pose a major threat to the “fresh start” promised by the bankruptcy system.

Nature of Community Associations and their Claims

The attributes of community association claims and the interest of the owner/debtor in the property will vary according to the type of association involved, the governing documents of the association, and the relationship between the unit owner/debtor and the association. Therefore, to start with, it is important to understand what these associations are and how they differ in terms of structure, unit ownership, and claims for dues and assessments.

Condominiums are a form of multiunit development which has been subjected to an ownership regime pursuant to the Maryland Condominium Act, Md. Ann. Code, RP Article, §11-101 et. seq. Under a condominium regime, individual units (consisting primarily of the space within the walls) are owned as real property by the individual owners, who will also have the use of the common areas. The condominium is governed by a council of unit owners, which may or may not be incorporated, and which is responsible for management of the common areas and for enforcement of condominium rules and regulations. Condominium operations (usually handled by a management company) are paid for through the collection of fees, usually monthly, or by special assessments. In the event of a default in payment, the council is empowered to place a lien on the unit pursuant to the provisions of the Maryland Contract Lien Act, RP §14-201 et. seq. Alternatively the council may file suit against the delinquent owner, or it may do both.

Other kinds of real estate developments, such as a development of single-family homes or building lots, may have a homeowners’ association (HOA) which is analogous to the condominium council. The HOA is responsible for the enforcement of covenants and for the maintenance of the common areas for the benefit of the community as a whole. HOA

---

1 A precise description of the contents of a unit will be included in the condominium declaration filed by the developer which may, for example, stipulate that unit ownership includes ownership of balconies and porches or other attributes of the unit; cf. RP §11-103.
attributes, powers, and responsibilities are set forth in the Maryland Homeowners’ Association Act, RP §11B-101 et. seq. As is the case with a condominium council, the operations of an HOA are funded by monthly or annual dues or fees. This authority will be set forth in a declaration filed in the land records. Again, as is the case with a condominium council, in the event of a default in the payment of mandatory fees, the association may place a lien on the lot in question pursuant to the Contract Lien Act, or may file suit, or may do both.

A cooperative housing corporation or “co-op,” on the other hand, is an entirely different animal from a condominium or a development governed by an HOA, and the mechanism for the collection of fees and assessments is accordingly different from that available to condominium councils or HOAs. The critical difference is that, in a co-op, the individual members do not own their units as real estate. Co-ops are a special kind of corporation, and the ownership interest acquired by a co-op resident is personal property. Ownership of the real estate is vested in the co-op corporation, as set forth in Md. Ann. Code, Corp. & Assoc. Article §5-6B. Rather than an ownership of the unit, the resident acquires a “cooperative interest” in the co-op, analogous to stock. Coupled with this “cooperative interest” is a so-called “proprietary lease” in a particular unit which provides for the use of that unit by the co-op owner, subject to specific terms, conditions, and regulations. These will include the obligation to pay rent to cover expenses and capital costs. The rent obligation is analogous to the obligation to pay fees in the case of a condominium or HOA, but the enforcement of the obligation is very different. The Contract Lien Act is not available to co-ops as a collection aid, there being no real estate to which a lien can attach. For the same reason, entry of a circuit court judgment will not automatically create a lien on the “owner’s” interest unless an attachment is issued. Under the co-op structure, the primary enforcement mechanisms are governed by landlord-tenant law: termination of the underlying agreement and the proprietary lease, and eviction from the unit. See Green v. Greenbelt Homes, Inc., 232 Md. 496, 504, 194 A.2d 273, 277 (1963); also, e.g., Village Green v. Randolph, 361 Md. 179, 760 A.2d 716 (2000).

The differences among the types of real estate developments and their governance is reflected in the way in which ownership and claims are treated in a bankruptcy case. Because of the ready availability of a Contract Lien Act lien, claims for HOA and condominium fees which arise in a bankruptcy case will often be secured, while similar claims in the case of a co-op will often be unsecured or may possibly be secured by a UCC security interest. These different forms of ownership will also be scheduled differently, with interests in condominiums and HOA-governed properties listed as real property in Schedule A, while the interests of a co-op “owner” will be shown as personal property and as executory contracts on Schedules B and G respectively.

Liens Created Under the Contract Lien Act and Other Collection Methods

Condominium associations and HOAs are usually, of necessity, very aggressive in the collection of past due fees. Experience has shown that aggressive collection sends a signal to the other unit owners which encourages prompt payment, and conversely that a failure to
collect aggressively sends exactly the opposite message. Moreover, it is in the best interest of a condominium association or HOA to replace a nonpaying owner with a paying owner as soon as possible. Operating costs can build rapidly, and some delinquencies will always exist. These fees are the lifeblood of the development, and a failure to collect adequate fees can prove catastrophic. Delinquency rates have increased in the current economy, forcing even more active collection of past-due fees as a matter of basic survival.

Condominium councils have one collection tool available to them which is not present in the statutes governing HOAs and co-ops, and that is acceleration of liability; if the assessment of fees is annual but with payment broken into monthly installments, the council can give 15 days’ notice in the event of a delinquency and can then accelerate the entire remaining balance if the account is not brought current; cf. RP §11-110(e)(3).

One option available to community associations is to file suit, usually in the District Court, obtain a judgment, and record the judgment to place a lien on the condominium unit or HOA lot. A judgment offers the further benefit of enabling the attachment of personal property. However, in many cases the association will also place a lien through the Maryland Contract Lien Act, a very simple and relatively quick procedure. All the association needs to do is serve a notice of intent to place the lien. If the owner wishes to contest the issue of probable cause for placement of a lien, he must do so by filing a case in the Circuit Court. Absent a timely challenge, or payment of the amount due, the association files a notice of lien in the land records, and the lien is thus established. The lien may then be enforced according to the procedures utilized for foreclosure sales, subject to the applicable Maryland Rules of Procedure and to relief from the automatic stay if a bankruptcy case is pending.

Prior to 2011, such a lien took priority from the date of filing in the land records. In 2011, however, the statutes governing condominium associations and HOAs, respectively, were amended to provide a limited first priority for contract liens as against the liens of certain first mortgages and deeds of trust; cf. RP §11-110(f)(2). This special priority applies only in foreclosure cases and only with respect to mortgages recorded after October 1, 2011, and it provides that a condominium contract lien will automatically prime the existing

---

2 For example, it is possible for a condominium council to build a huge arrearage in utility payments over a relatively short period of time if cash flows are inadequate, especially if there is no equipment for submetering which would bill the utilities to the individual owners. If arrearages are not cured, the development may suffer a shutoff and, theoretically, can be condemned as a result, or the development may be driven into a bankruptcy reorganization. For an example, see In re Lynnhill Condominium, Case No. 05-38059 (Bankr. D. Md.) and a successor Chapter 11 case, In re Lynnhill Condominium, Case No. 10-19462 (Bankr. D. Md.). In the first case, the reorganization failed; in the second, a Chapter 11 plan was confirmed. Both cases were propelled by massive utility arrearages. The operating budget in the successful case assumes a continuing delinquency rate of about 30 percent, i.e., 30 percent of owners paying nothing, even with aggressive collection. Sometimes an increase in assessments can provide a solution, but such an increase may not be acceptable to those unit owners who are paying, and depending on the organic documents of the association, it may or may not be possible to force the issue. That problem led to the collapse of a condominium association’s Chapter 11 case in In re Camelot Club Condominium Association, 2011 LEXIS 3393 (Bankr. N.D. Ga. 2011).

3 For a detailed discussion of these procedures as well as a cautionary tale showing what may happen if these procedures are not followed, see D’Aoust v. Diamond, ___ Md. App. ____, A.3d __ (Md. App. 2012)(sanctions applied where counsel failed to give proper notice and still proceeded with judicial sale).
mortgage lien to a maximum of $1,200.00 in condominium fees or up to four months’ regular fee assessments, whichever is less. It does not apply to any charges other than the fees themselves; i.e., interest, counsel fees, and other collection costs are excluded from this priority. In addition, the special priority provided for in the 2011 amendments appears not to apply to tax liens or judgment liens as these are not mentioned in the amendment language. This scheme also applies to HOAs; cf. RP §11B-117(c)(2) and (3).

In the event that a foreclosure is contemplated, therefore, Debtor’s counsel must take particular care to apply the proper priority to a Contract Lien Act lien in structuring a Chapter 13 or Chapter 11 plan. Further, a Contract Lien Act claim ordinarily will not be subject to the stripping provision in 11 U.S.C. §522(f)(1). In the case of a co-op corporation claim, however, the Contract Lien Act does not apply; therefore, if there is a lien securing such a claim it will usually be a judgment lien (although a UCC lien covering the “owner” interest in the co-op corporation is also possible). Bifurcation of such liens will not apply, because there is no equivalent for co-ops to the priority scheme enacted for condominiums and HOAs; and, where there is a judicial lien, it will be subject to lien stripping where an exemption is impaired.

One question that apparently has not been resolved is whether or this “special priority” would prevent a complete stripoff of a condo or HOA contract lien. Lien stripping is allowed and has been held not to violate the antimodification provisions of the Code where a lien is totally under water so that claim is actually unsecured so that the lien is stripped off, not down; see, e.g., Widewaters Village Community Association, Inc. v. Haywood, 2010 U.S. Dist. LEXIS 143897 (E.D. N.C. 2010). However, the existence of a “special priority” muddies the determination of whether or not the HOA or condo lien is, in fact, not covered to any degree by value in the property. Arguably it would not, since the “special priority” exists only in case of a foreclosure; but it does not appear that any case law exists on this point4.

Allowance of Association Claims

The nature of association claims and their treatment in bankruptcy are likely to vary according to the type of lien involved, if any, and the type of association. It can also vary according to the chapter. To the extent that the claim is not secured by a lien, in most cases (including all cases in Chapters 7 and 13), the claim will be a general unsecured claim without priority; cf., e.g., In re Smith, 206 B.R. 113 (Bankr. D. Md. 1997)(priority denied for HOA claim). However, in a Chapter 11 or Chapter 13 case in which the debtor occupies or uses the property, it is also possible for the claim, to the extent it is treated as postpetition, to have administrative priority based on specific benefit conferred on the estate; see, generally, In re Hall, 443 B.R. 59 (Bankr. D. Md. 2010); also In re Guillebeaux, 361 B.R. 87 (Bankr. M.D. N.C. 2007).

Much of the typical HOA, condominium, or co-op claim will relate to counsel fees, late charges, perhaps interest, and other miscellaneous charges. Those incurred prepetition will

---

4 There is also a possibility that the condo or HOA documents may contain a clause subordinating its lien rights to those of purchase money lenders, thus making a stripoff possible. See, e.g., Frazer v Property Owners’ Association of Canyon Village at Cypress Springs, 466 B.R. 107 (Bankr. S.D. Tex. March 5, 2012).
generally be allowed if reasonable. Such charges will not be allowed for the postpetition period unless the claim is secured and there is sufficient equity justifying allowance of such a claim under 11 U.S.C. §506; Smith, supra, 443 B.R. at 115. In a Chapter 13 case, in which prepetition assessments will be discharged, the postpetition counsel fees relating to the prepetition claim will likewise be discharged. Id. at 116.

The Maryland Court of Appeals addressed the allowance of fee claims in the recent case of Monmouth Meadows Homeowners’ Association, Inc. v. Hamilton, 416 Md. 325, 7 A.3d 1 (2010)(a consolidated appeal of three cases, in which the lower courts had considered the allowability of counsel fees).5 The law firm involved, a specialty firm with great experience and skill in this area of practice, had sued several individuals for delinquent annual assessments, and in each case the counsel fees, interest, late charges, and collection expenses tacked on were greater in amount than the assessments; yet it did not appear that the fees were padded or that unnecessary work was performed. The billing method charged flat fees for certain simple tasks and hourly rates for others. In all three cases, the Maryland District Court, exercising its discretion, had simply awarded 15 percent of the assessments at issue, and the law firm appealed, seeking fees as determined by a “lodestar” analysis similar to that employed by the bankruptcy courts (“reasonable” hourly rate times hours of service “reasonable expended,” adjusted appropriately based on several external factors); Monmouth Meadows, supra, 416 Md. at 330. On appeal, the Circuit Court in two of the cases (Hamilton and Tillery) allowed the fees requested for obtaining the contract lien and for the District Court litigation, but denied the fees incurred on appeal; in the third case (Thomas-Ojo), the Circuit Court considered the “lodestar” method, determined that it was not bound to use it, and instead considered reasonableness in light of the similar standards set forth in Rule 1.5 of the Maryland Rules of Professional Conduct. It awarded a sharply reduced fee in the third case and also denied fees for appeals.6 On a further appeal, the Court of Appeals agreed with the law firm that there was no basis in the documents or otherwise for arbitrarily limiting fees to 15 percent, yet it went on to hold that the use of a “lodestar” methodology was inappropriate in the absence of a fee-shifting statute, where the obligation to pay counsel fees was simply a matter of contract. Monmouth Meadows, 416 Md. at 336. Following the analysis employed by the Circuit Court in Thomas-Ojo, the Court of Appeals found that the award there was at the low end of reasonableness, but since the standard on appeal was review for an abuse of discretion, the award of the Circuit Court was affirmed.

The allowance of attorneys’ fees as a component of a bankruptcy claim is a federal matter, governed by federal standards. Nevertheless, the analysis applied in the Thomas-Ojo case as described in Monmouth Meadows is worthy of a careful reading as it tracks in many respects the portion of a federal-style analysis that would employ a “lodestar” and the Johnson factors. To the extent that it goes beyond that point, the analysis in Monmouth

---

5 The other two cases were Montpelier Homeowners’ Association, Inc. v. Thomas-Ojo, 408 Md. 487, 970 A.2d 892 (2009) and Constant Friendship Homeowners Association, Inc. v. Tillery, 408 Md. 487, 970 A.2d 892 (2009). The final decision was rendered on a motion for reconsideration.

6 The Circuit Court cut with a sharp blade. For example, some 10 hours had been spent in obtaining and defending an affidavit judgment against Ojos; the Circuit Court considered this to be a task worthy of 15 minutes due to the lack of opposition. However, the Court of Appeals noted expressly that it was making no ruling on the reasonableness of the fees the law firm was charging the association. Thus, to the extent the fees were disallowed, the burden nevertheless fell on the association.
Meadows seems essentially identical to the consideration of “billing judgment” which has become standard in the District of Maryland as an overlay to the “lodestar”; cf. In re Leonard Jed Co., 118 B.R. 339 (Bankr. D. Md 1990). Indeed it is extremely hard to see how one could distinguish between the two methods, regardless of their different origins. Debtors’ counsel will want to take careful note of Monmouth Meadows in evaluating proofs of claim. Also worth reading is Judge Mannes’s decision in In re Wallace, 2010 LEXIS 4399 (Bankr. D. Md. 2010)(noting that the attorneys’ fees component of a condo association claim “appears debatable in that the attorney’s fees sought are almost equal to the amount sought to be collected.”)

Dischargeability of Association Assessments

There are two statutory standards for dischargeability of community association dues and assessments; 11 U.S.C. §523(a)(16) is applicable in Chapter 7 and 11 cases, while 11 U.S.C. §1328(a) applies in Chapter 13 cases (with the exception of “hardship discharge” cases, in which §523(a) applies in its entirety).

There was a great deal of confusion on the issue of nondischargeability until the enactment of BAPCPA in 2005. Prior to 1994, there was no specific provision in the Code dealing with the dischargeability of community association fees. Instead courts used three different analytical approaches, all of which were essentially temporal, i.e., based on the date of the claim rather than the nature of the claim as that of a community association. Fees deemed prepetition could be discharged; postpetition fees could not. The problem was in determining the nature of the claim as pre- or post-petition. Some cases based their decision on when the conduct by the debtor which created the liability took place, such as the signing of a contract (the “conduct” method); these cases held that fees which arose from a prepetition contract could be discharged even if they related to a postpetition period of time. Other cases viewed the fees as accruing individually for each time unit, since they were unenforceable prior to that time, so that fees for postpetition months would not be discharged (the so-called “right to payment” test). Under a third test (the “fair contemplation” or “narrow conduct” test), the determining fact was whether or not the claim was within the “fair contemplation” of the creditor prepetition. Cf. generally In re Barr, 457 B.R. 733 (Bankr. N.D. Ill. 2011), discussing the history of these cases; see also Maple Forest Condominium Association v. Spencer, 457 B.R. 601 (E.D. Mich. 2011). The Fourth Circuit test was conduct-related and was based on the idea that HOA or condominium dues were in the nature of a covenant running with the land and so accrued period by period based on the debtor’s continuation of ownership rather than a prepetition contract. Thus fees that accrued postpetition were considered nondischargeable; cf. River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld), 23 F.3d 833 (4th Cir. 1994).

In 1994, in the hope of resolving the confusion at least as to Chapter 7, Congress amended the Code to provide in §523(a)(16) that assessments would be nondischargeable if the fee was due and payable after the entry of the order for relief. The 1994 version of §523(a)(16) was oddly narrow in that it referred only to fees charged by condominiums and
co-op associations; nothing was said about HOAs\(^7\). Furthermore, the 1994 version applied nondischargeability only if the unit in question was *occupied by* the debtor or rented to a third party. Nothing was said about units that had been abandoned or were vacant and not rented to anyone\(^8\). Finally, §523(a)(16) as of 1994 stated that fees and assessments for periods arising prior to the order for relief could be discharged.

The ambiguities and limitations of the 1994 version were addressed more or less successfully in BAPCPA. Under the current version of §523(a)(16), community association dues *which became due and payable after* the order for relief in a bankruptcy case are nondischargeable; 11 U.S.C. §523(a)(16). Those dues and assessments which are for a period arising before entry of the order for relief, however, can be discharged. There is no indication that annual fees or assessments should be prorated to reflect pre- and post-petition increments; that issue has not been addressed in any reported case. The 2005 amendment is a both broader and clearer than the 1994 version, however, as it now specifically applies to all three forms of community association and covers all postpetition charges that fall due while the debtor has any ownership interest whatsoever in the property, whether it be legal, equitable, or simply possessory. Further, the 2005 version did away with the exclusion for vacant units and now provides that nondischargeability applies regardless of whether or not the unit is occupied by anyone. Thus there must be a transfer of ownership for the obligation to cease accruals\(^9\).

In the event a condominium unit is sold by a voluntary sale, the owner grantor and the grantee share joint and several liability for condo fees up until the time that the grantor has parted with his entire interest. The provision in §11-110 imposing this joint and several liability on grantor and grantee does not apply to foreclosures or other judicial sales. Instead, in those cases, it appears that the liability passes to the grantee upon the fall of the hammer, even if the sale has not yet been ratified; cf. *Campbell v. Bayside Condominium*, _____ Md. App. ____ (Md. App. 2012).

Section 523(a)(16), however, was and still is inapplicable in most Chapter 13 cases is it is not one of those subsections of §523 enumerated in §1328(a)(2). There is relatively little case law applying this exclusion. A few cases have held that, for this reason, assessments which have accrued postpetition and are dealt with in the plan are discharged by completion of a Chapter 13 plan; see, e.g., *In re Cook*, 2010 Bankr. LEXIS 4372 (Bankr. E.D. Va. 2010) and *In re Heflin*, 2010 Bankr. LEXIS 1253 (Bankr. E.D. Va. 2010); *In re Colon*, 465 B.R. 657 (Bankr. D. Utah 2011). These cases generally seem to be based on the idea that the assessments are “contractual” in nature, therefore essentially prepetition obligations which

---

\(^7\) While noting that the legislative history was sufficiently broad to encompass homeowners’ associations, one court held that the plain language of §523(a)(16) prevented such application; cf. *Old Bridge Estates Community Association, Inc., v. Lozada* (*In re Lozada*), 214 B.R. 558 (Bankr. E.D. Va. 1997), affirmed per curiam 1999 U.S. App. LEXIS 6260 (4th Cir. 1999). Instead, it found that fees which had accrued postpetition were not discharged because of the timing, citing the Fourth Circuit’s decision in *Rosenfeld*.

\(^8\) Presumably this would have changed the result in *Rosenfeld*, where the property owner had provided in his plan for a surrender, had vacated the unit, and had signed a consent order granting relief from the automatic stay, but the bank had not gone forward with foreclosure, leaving the owner in title.

\(^9\) This harmonizes with Maryland law, which provides that condominium fees continue to accrue even if a unit has been abandoned by the owner; cf. RP §11-110.
merely mature after the petition date. On the other hand, under the reasoning in *Rosenfels*,
the obligation to pay dues is regarded as arising postpetition based on a covenant running
with the land, thus does not arise prepetition and would not be included in the discharge.
Thus there is case law based on this theory excepting postpetition accruals from discharge in
a Chapter 13 case; see, e.g., *Maple Forest Condominium Association v. Spencer (In re
Spencer)*, 457 B.R. 601 (E.D. Mich. 2011)(postpetition accruals were not discharged
because, under local law, they arose under a covenant running with the land; reversing the
decision to the contrary by the bankruptcy court); also *In re Foster*, 435 B.R. 650 (9th Cir.
BAP 2010)(obligation to pay dues arises from a covenant running with the land, thus is not
“contractual,” instead is incidental to ownership and not discharged postpetition). In the
relatively rare case in which a hardship discharge is granted pursuant to §1328(b), all of
§523(a) applies, including §523(a)(16); cf. §1328(c)(2). It appears that this issue has not yet
been fully fleshed out. In addition, it is unclear how the precedents that do exist would be
applied to a co-op, where the “owner” is merely a tenant. Arguments can be fashioned either
way.\(^{10}\)

Finally on this topic, it should be understood that actions of an association that are
directed toward maintaining health and safety, if taken against a bankruptcy debtor, will not
violate either the automatic stay pre-discharge or the §524 discharge injunction; cf. *In re
N.D. Ohio 2007). Thus, for example, an association can enforce a covenant to remove debris
from a lot without running afoul of a bankruptcy stay.

**The Gridlock Problem**

Considering the nondischargeability of community association dues and the difficulty of
refinancing or selling property in the current market, many homeowners have been faced
with a kind of gridlock; that is, they cannot sell, they cannot surrender property effectively,
and lenders often are refusing to foreclose, with the result being an ongoing buildup of
nondischargeable debt with little hope of an immediate remedy for the beleaguered owner.
Numerous postings to the internet service of the MSBA Consumer Bankruptcy Section
testify to the difficulty that many homeowners face when attempting to divest themselves of
the liabilities attendant to property ownership.

Surrender of property does not, in and of itself, transfer title; and it is difficult if not
impossible in a contested situation to force a lender to foreclose or even to take title to
abandoned property.\(^{11}\) Thus the condominium unit, HOA lot, or co-op becomes a sort of “tar

\(^{10}\) The argument was made in *Colon* that postpetition assessments arose out of a covenant running with the land
and thus were nondischargeable under the reasoning of the *Foster* case. However, the court sidestepped this
argument, finding that the owner’s interest was not sufficiently “consequential” for a covenant running with the
land to apply. This kind of reasoning could lead to a finding of dischargeability in the case of a co-op since it
can be argued with some force that the charges there are merely “contractual.”

\(^{11}\) Most cases have held that surrender by a debtor gives free rein to the secured creditor to take action but does
not cause a transfer of title or compel any action, such as acceptance of a deed in lieu or a foreclosure on the
part of a creditor or physical surrender of possession by a debtor. Thus, Code Section 1325(a)(5)(C), which
authorizes surrender in the context of a Chapter 13 plan, has been interpreted as merely ceding the right to
possess the collateral. *See, e.g.*, *In re Cormier*, 434 B.R. 222 (Bankr. D. Mass. 2010). In a few cases,
baby” for which no one wishes to take responsibility. In general, the courts have offered no relief. Under extreme circumstances, however, one court did find a way.

In *Pigg v. BAC Home Loans Servicing LLP (In re Pigg)*, 457 B.R. 728 (Bankr. M.D. Tenn. 2011), the Chapter 7 debtor owned a condominium unit which had been severely damaged in a catastrophic flood that had devastated the city of Nashville. The debtor had abandoned the unit, and the bank had taken possession to prevent further damage. The property was uninhabitable, the debtor had no flood insurance or sufficient money with which to make repairs, and the condominium fees continued to accrue. The debtor had indicated her intent to surrender the unit, but the bank did not foreclose. Under pressure from the bank and from the condominium association, both of which insisted that she remained responsible for the fees, the debtor filed an adversary proceeding against the bank asking that the court compel the bank to accept a deed in lieu of foreclosure. The bank argued that it had no obligation to take a deed in lieu and that the law which imposed liability for the fees upon the debtor, while harsh, was nevertheless the law. The court expressed great sympathy for the debtor and noted the extreme inequity of the situation:

“The Bank is the unintended beneficiary of the perfect storm of natural disaster and this legislative inequity. While 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. As both BMC and the Bank admitted, the Bank receives the benefit of the HOA services such as landscaping improvements, common area maintenance, signage and security. Meanwhile the debtor who does not even live in the flooded condominium and has tried valiantly to handle her financial crisis caused by the flood receives minimal if any benefit for fees she must pay.

*Pigg, supra,* 457 B.R. at 733 n.5. The court also noted with undisguised disgust that §523(a)(16), which it observed was “no doubt the result of special interest lobbying,” did not exonerate the victims of natural disasters such as the Nashville floods and the horrendous tornado which had destroyed Joplin, Mo. and concluded that “the perfect storm of the Great Recession and these unspeakable natural disasters” left debtors such as Ms. Pigg “to suffer unbearable losses…and be denied the fresh start promised by bankruptcy.” Id. at 733. Observing that the court’s equitable powers under 11 U.S.C. §105 are constrained by the Code, so that the court could not grant a discharge of the fees in contravention of §523(a)(16), the court in *Pigg* nevertheless fashioned an extraordinary equitable remedy, ordering that the debtor’s discharge and the order modifying the stay be set aside temporarily; that the trustee sell the property and apply the proceeds according to the proper priorities; and then reinstating the discharge. Because the condominium association lien had first priority under local law, this meant that a sale would wipe out the debtor’s obligation for association fees and would have no obligation going forward. The court further found that

however, a so-called “eat dirt” plan filed in Chapter 11 has been permitted, forcing a transfer of property as payment for a debt; cf. *In re May*, 174 B.R. 832 (Bankr. D. Ga. 1994). And, in one case, a court held that an oversecured claim can be satisfied by a distribution of collateral; see *In re Donohue*, 231 B.R. 865 (Bankr. D. Vt. 1998)(basing its decision on the “eat dirt” concept, which the court thought might be used in Chapter 13).
the Bank and the HOA had effectively consented to a Section 363 sale free and clear of liens by virtue of their inaction.