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## Rewriting 11 U.S.C. § 523 (a)(16): The Problems of Delayed Foreclosure and Judicial Activism

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## **REWRITING 11 U.S.C. § 523(A)(16): THE PROBLEMS OF DELAYED FORECLOSURE AND JUDICIAL ACTIVISM**

### **ABSTRACT**

*To protect the interests of homeowners' associations and other housing communities in situations where their member homeowners have declared bankruptcy, § 523(a)(16) of the Bankruptcy Code exempts from discharge any "fee or assessment" that becomes due after the order of relief, as long as the debtor has a "legal, equitable, or possessory ownership interest" in the property. This section was intended to unify through legislation a split of authority deciding how to handle such postpetition fees.*

*Unfortunately, by electing to protect first and foremost the interests of HOAs, Congress placed debtors in a position not conducive to the idea of a fresh start by which bankruptcy law is ordinarily guided. The result is a group of cases that are inconsistent with one another and with the Code, as some courts have taken steps to attempt to ease the burden on the debtor, while others have noted with resignation that, fair or not, the Code's plain language is clear and precludes judicial intervention. Further muddying the waters, the problems with the Code are different depending on whether the debtor's discharge was affected under § 727, § 1328(a), or § 1328(b).*

*Given that the Code as written has failed to accomplish the unity sought in curing the split of authority, Congress should revisit not only its language but also the policy that informed the amendment. The nation's economic realities have changed since the 2005 amendment was passed, and these changes have brought into sharp focus the problems with the exception as it currently applies.*

## I. INTRODUCTION

While a debtor's bankruptcy has the potential to harm all creditors, Congress has set out to protect a class of creditors that is particularly vulnerable to economic turmoil caused by bankruptcy: homeowners' associations, condominium management organizations, and housing cooperatives (collectively, "HOAs").<sup>1</sup> In an effort to protect HOAs, § 523(a)(16) of the Bankruptcy Code (Code) made postpetition HOA dues nondischargeable "for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest" in the property that is burdened by HOA fees.<sup>2</sup> On its face, this provision seems obvious and logical, and many courts ruled this way even before the initial version of the provision was enacted in 1994 to cure disagreement among various courts.<sup>3</sup> These decisions were based on the theory that "the debtor's obligation to pay the assessments arose from his continued postpetition ownership of the property and not from a prepetition contractual obligation."<sup>4</sup> This makes sense on the most basic level; to continue reaping the benefits of association membership, as a homeowner does while she continues to own property in the neighborhood, a homeowner should be expected to contribute to that association's financial resources.

However, in practice, § 523(a)(16) creates two distinct problems. The first is that ownership is not such a simple concept. Although debtors in this situation can be essentially broken into two categories—vacating and non-vacating homeowners—the Code does not distinguish between the two groups. As a result, courts sometimes take extraordinary steps to interpret the Code in a way that allows vacating homeowners' postpetition HOA fees to be discharged while still requiring non-vacating homeowners to continue paying. This seems only fair, but is not within the Code's plain language.

The second problem is that, under a strict interpretation of the plain language, this common-sense outcome is achieved only in chapter 7 non-

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<sup>1</sup> H. R. REP. NO. 109-31, at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 154.

<sup>2</sup> 11 U.S.C. § 523(a)(16) (2012).

<sup>3</sup> *See, e.g.,* River Place E. Hous. Corp. v. Rosenfeld (*In re Rosenfeld*), 23 F.3d 833 (4th Cir. 1994) (holding that fees, dues, and assessments owed to community associations arose out of a covenant running with the land that was effective as long as the debtor retained the property).

<sup>4</sup> Alfred Q. Ricotta, Comment, *Community Associations and Bankruptcy: Why Postpetition Assessments Should Not Be Dischargeable*, 15 BANKR. DEV. J. 187, 192 (1998).

vacated-property cases and in some chapter 13 vacated-property cases.<sup>5</sup> This is because the exception provided for in § 523(a)(16), like most other § 523(a) exceptions, does not apply in ordinary chapter 13 cases when discharge is executed under § 1328(a).<sup>6</sup> The result of this strict reading of the Code is that in any chapter 7 case in which the debtor vacates a property on which the creditor does not timely foreclose, the homeowner is left paying recurring fees for a home she no longer occupies.<sup>7</sup> The opposite problem is caused by the inapplicability of the exception to § 1328(a), which can lead to either a non-vacating homeowner having her debts discharged or a vacating homeowner being expected to pay, depending on the court's statutory interpretation.

In the chapter 7 context especially, some courts have reacted by throwing up their collective hands and yielding to the Code's clear, but inequitable, plain language. Others have been more creative in overcoming explicit congressional actions even when they lead to either unfair liability imposed upon debtors (in the case of chapter 7 and § 1328(b) vacating homeowners), or a potential windfall in favor of debtors (in the case of § 1328(a) non-vacating homeowners). By examining cases representing both scenarios, this Comment will argue that it is necessary for Congress to once again revisit the language of § 523(a)(16) to align the outcomes demanded by the Code with the ideals of fairness and reason outlined by those cases that expressed such disapproval of the statutory outcomes. Fixing the legislation is crucial, for despite the importance of protecting vacating debtors<sup>8</sup> and preventing non-vacating debtors from discharging their HOA fees,<sup>9</sup> the only way courts can unilaterally

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<sup>5</sup> A small set of chapter 11 cases, where the debtor is an individual, is influenced by the statute in a similar way. *See* 11 U.S.C. § 1141(d)(2). It mirrors the application of the chapter 7 case, so the outcome of a chapter 11, non-vacated case would also come out appropriately.

<sup>6</sup> *See id.* § 523(a). By contrast, the exception *does* apply to discharge under § 1328(b). *Id.*

<sup>7</sup> *See generally* Pigg v. BAC Home Loans Servicing, L.P. (*In re* Pigg), 453 B.R. 728 (Bankr. M.D. Tenn. 2011); Foster v. Double R Ranch Ass'n (*In re* Foster), 435 B.R. 650 (B.A.P. 9th Cir. 2010).

<sup>8</sup> *See, e.g.,* Allard v. G & P Enters. (*In re* Allard), No. 07-11487, 2012 WL 2830158, at \*1 (Bankr. N.D. Cal. July 10, 2012) (expressing sympathy with vacating debtor's position, but concluding that it is to rule according to the statute); *In re* Brown, No. 09-14949, 2011 WL 1322311, at \*2 (Bankr. D.N.J. Apr. 6, 2011) (holding that vacating debtor's postpetition HOA fees were nondischargeable); Canning v. Beneficial Me., Inc. (*In re* Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011) (stating that creditor did not violate a discharge injunction by failing to foreclose upon the debtor's property); *In re* Colon, 465 B.R. 657, 663 (Bankr. D. Utah 2011) (noting that holding vacating debtors liable for postpetition HOA fees is "not only inequitable, but in contrast to the plain language of § 1328(a)"); Pigg, 453 B.R. at 731, 736 (holding that bank and HOA consented to sale by their inaction when the debtor abandoned property in a chapter 7 case).

<sup>9</sup> *See generally* Foster, 435 B.R. at 650 (holding that postpetition fees of non-vacating debtors are nondischargeable when debtor obtained a discharge through § 1328(a)).

meet these goals is by taking steps that risk usurping Congress's traditional rulemaking role.<sup>10</sup>

This Comment begins with a discussion of the discrepancy between how the § 523(a)(16) exception would operate if applied according to its plain language and how it has been typically applied in practice. Cases decided under each of the discharge provisions illustrate the need for an additional amendment to this portion of the Code. The Comment then concludes with a discussion of the changes Congress could make to better balance the competing interests involved in a bankruptcy case. In the end it depends on which interests Congress most strongly favors. However, because the purpose of this provision as written seems in conflict with the overall goals of bankruptcy, a change of some kind needs to be made to clarify once and for all the role of the HOA creditor in bankruptcy.

## II. BACKGROUND

### A. *Statutory Provisions and Legislative History*

Section 523(a) contains various exceptions to any “discharge under [§] 727, 1141, 1228(a), 1228(b), or 1328(b).”<sup>11</sup> This Comment will focus on those chapters that deal with bankruptcy proceedings initiated by individual debtors: chapter 7 liquidation cases and chapter 13 payment plan cases. In particular, this Comment considers the consequences of § 523(a)(16), which prevents the discharge of any “assessment[s]” owed to an HOA if those assessments arise postpetition.<sup>12</sup> That section makes nondischargeable any debt:

for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory

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<sup>10</sup> See *Allard*, 2012 WL 2830158, at \*1; *Brown*, 2011 WL 1322311, at \*2; *Canning*, 442 B.R. at 172; *Colon*, 465 B.R. at 662–63; *Pigg*, 453 B.R. at 733–35.

<sup>11</sup> 11 U.S.C. § 523(a). Chapter 12 cases, which are limited to family farmers and fishermen, are so unique, specific, and rarely used, that they are not examined in this Comment. *Id.* § 109(f). Chapter 11 cases, meanwhile, invoke this exception only in very limited circumstances because they deal primarily with companies, which rarely owe debts to the types of living communities contemplated by the statute. On the rare occasion that a chapter 11 case does deal with an individual debt, the process mirrors that of a chapter 7 case, so that section will not receive its own analysis. See, e.g., *In re Burgueno*, 451 B.R. 1, 3 (Bankr. D. Ariz. 2011).

<sup>12</sup> 11 U.S.C. § 523(a)(16).

ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.<sup>13</sup>

As introduced above, one notable problem with this exception in its present form is Congress's 2005 extension of the § 523(a)(16) exception to any "legal, equitable, or possessory" interest in the real property on which assessments are due.<sup>14</sup> The second problem is Congress's decision not to except from discharge such debts under § 1328(a) as it does under § 1328(b).<sup>15</sup>

While strange, the decision not to apply the § 523(a)(16) exception to all bankruptcy cases seems intentional given that the relevant portion of § 523(a) has been amended once already, despite the fact that it had been effective for less than twenty years.<sup>16</sup> Passed in 1994, the section was enacted to "resolve the split of authority . . . regarding the dischargeability of postpetition assessments."<sup>17</sup> This split consisted of three main lines of authority:<sup>18</sup> (1) under the first, postpetition assessments were not dischargeable because they arose from a covenant that ran with ownership of the land;<sup>19</sup> (2) under the second, they were dischargeable as part of a prepetition contract;<sup>20</sup> and (3) under the third, courts favored a compromising position that made debts dischargeable "unless the debtor resided in or leased the unit."<sup>21</sup> Some courts have concluded that Congress elected to enact this third line of reasoning in the 1994 Act,<sup>22</sup> but in fact the amendment created a new question.

Rather than focusing, as the preceding cases had done, on the nature of the agreement from which the obligation arose—that is, in the form of either a covenant running with the land or as a prepetition contract—Congress decided

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Section 1328(b) is a rarely used provision that allows a hardship discharge if "the debtor's failure to complete . . . payments [under the plan] is due to circumstances for which the debtor should not justly be held accountable." *Id.* § 1328(b).

<sup>16</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 412, 119 Stat. 23, 107 (codified as amended at 11 U.S.C. § 523(a)(16)); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 309, 108 Stat. 4106, 4137 (codified as amended at 11 U.S.C. § 523(a)(16) (1996)).

<sup>17</sup> Ricotta, *supra* note 4, at 190; see 11 U.S.C. § 523(a)(16) (1996).

<sup>18</sup> Ricotta, *supra* note 4, at 191.

<sup>19</sup> *Id.* (citing *River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833 (4th Cir. 1994)).

<sup>20</sup> *Id.* (citing *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990)).

<sup>21</sup> *Id.* (citing *In re Ryan*, 100 B.R. 411 (Bankr. N.D. Ill. 1989)).

<sup>22</sup> *In re Whitten*, 192 B.R. 10, 13 (Bankr. D. Mass. 1996); see Ricotta, *supra* note 4, at 194.

to except from discharge all postpetition debts when discharge was brought under certain specified Code provisions.<sup>23</sup>

In 2005, the statute was amended again.<sup>24</sup> Congress passed the amendments under the influence of private interest groups<sup>25</sup> “to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor’s interest in” such communities.<sup>26</sup> To achieve this end, Congress expanded the provision’s exception, precluding discharge of postpetition assessments for property when the owner retains the much broader “legal, equitable, or possessory” interest, rather than limiting discharge only to properties possessed by or earning rent for the debtor.<sup>27</sup> Indeed, the legislative history indicates an express intent to expand preexisting limits to discharge “[i]rrespective of whether or not the debtor physically occupies such property.”<sup>28</sup>

One other statutory provision of importance to this analysis is 11 U.S.C. § 105(a),<sup>29</sup> which provides courts with the equitable powers that some have used to overcome inequities caused by the statute’s current formulation. That provision states:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.<sup>30</sup>

In interpreting this section of the Code, various courts have expressed the idea that “[w]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the [Code’s confines].”<sup>31</sup> Courts may therefore

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<sup>23</sup> See 11 U.S.C. § 523(a)(16) (2012).

<sup>24</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 412, 119 Stat. 23, 107 (codified as amended at 11 U.S.C. § 523(a)(16)).

<sup>25</sup> *Pigg v. BAC Home Loans Servicing, LP (In re Pigg)*, 453 B.R. 728, 733 (Bankr. M.D. Tenn. 2011). The *Pigg* court used this terminology derisively, possibly as a way of justifying its encroachment on legislative power.

<sup>26</sup> H.R. REP. NO. 109-31, at 88 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 154.

<sup>27</sup> 11 U.S.C. § 523(a)(16).

<sup>28</sup> H.R. REP. NO. 109-31, at 88.

<sup>29</sup> See generally 11 U.S.C. § 105(a).

<sup>30</sup> *Id.*

<sup>31</sup> *Nw. Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

exceed their expressed powers only to carry out the Code’s provisions;<sup>32</sup> these powers “do not amount to a ‘roving commission to do equity.’”<sup>33</sup> In other words, “when a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code.”<sup>34</sup> This Comment will argue that, in several instances, courts have taken liberties in enforcing the Code that exceed the equitable powers properly exercised under § 105.

### *B. Applying § 523(a)(16)*

To best understand the implications and interpretations of § 523(a)(16), it is helpful to examine the practical problems caused by the Code as it exists today. There are four sections through which an individual debtor may obtain discharge of his debts: §§ 727, 1328(a), 1328(b), and (rarely) 1141(d)(2).<sup>35</sup> Within each of these, a debtor may either seek to retain his property or to surrender it to his creditors. The table below provides an overview of each of these scenarios, comparing the intuitive outcome—where a vacating homeowner’s debt is discharged, while a non-vacating homeowner’s is not—with what actually results from a precise textualist application. A “√” in the actual result column indicates a match between the expected and actual outcome, while an “X” shows the opposite.

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<sup>32</sup> *Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728, 735 (Bankr. M.D. Tenn. 2011) (citing *Childress v. Middleton Arms, L.P. (In re Middleton Arms, L.P.)*, 934 F.2d 723, 724 (6th Cir. 1991)).

<sup>33</sup> *Pac. Shores Dev., L.L.C. v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1070 (9th Cir. 2004) (quoting *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1175 (9th Cir. 2003) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986))).

<sup>34</sup> *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993).

<sup>35</sup> As noted above, in a case involving an individual chapter 11 debtor, this exception has been applied in keeping with the chapter 7 rule described in the table. *In re Burgueno*, 451 B.R. 1, 3 (Bankr. D. Ariz. 2011) (citing *In re Brown*, No. 09-14949, 2011 WL 1322311 (Bankr. D.N.J. April 6, 2011)) (equating the circumstances with those in a chapter 7 case). Because of the parallel application under these two sections, this Comment will examine only the chapter 7 and chapter 13 situations.

|                            | Does § 523(a)(16) apply? | Property Retained | Property Surrendered |
|----------------------------|--------------------------|-------------------|----------------------|
| § 727 Intuitive Result     | Yes                      | No discharge      | Discharge            |
| § 727 Actual Result        |                          | No discharge – √  | No discharge – X     |
| § 1328(a) Intuitive Result | No                       | No discharge      | Discharge            |
| § 1328(a) Actual Result    |                          | Discharge – X     | Discharge – √        |
| § 1328(b) Intuitive Result | Yes                      | No discharge      | Discharge            |
| § 1328(b) Actual Result    |                          | No discharge – √  | No discharge – X     |

### 1. Chapter 7

Chapter 7 is the liquidation chapter of the Code.<sup>36</sup> Under this chapter, subject to various exceptions that need not be examined in detail here, a debtor's assets are sold to pay creditors from the proceeds.<sup>37</sup> Discharge under this chapter is governed by § 727, which relieves the debtor of all liability for any debts not otherwise declared nondischargeable by an applicable section of the Code.<sup>38</sup> Section 523(a) is one of these applicable exception sections,<sup>39</sup> so § 523(a)(16) acts to expressly except from discharge any "fee or assessment" to an HOA that arises after the filing of the petition.<sup>40</sup>

There seems to be little disagreement that this is a fair outcome as long as the homeowner intends to remain on the property.<sup>41</sup> By contrast, the exception has frequently been challenged when the homeowner surrendered the property as part of the bankruptcy proceeding, only to discover that a creditor was unwilling to initiate foreclosure proceedings. Since such proceedings would divest the homeowner of the ownership that triggers the § 523(a)(16)

<sup>36</sup> See 11 U.S.C. § 726 (2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* § 727; see, e.g., *id.* § 523(a)(1)–(18).

<sup>39</sup> *Id.* § 523(a).

<sup>40</sup> *Id.* § 523(a)(16).

<sup>41</sup> See, e.g., *Foster v. Double R Ranch Ass'n (In re Foster)*, 435 B.R. 650, 659 & n.10 (B.A.P. 9th Cir. 2010).

exception, the ongoing debt becomes nondischargeable.<sup>42</sup> Nevertheless, looking only at the Code and the legislative history, it seems clear that the “legal, equitable, or possessory” interest language from the 2005 amendment was an express expansion of the 1994 version intended by Congress to apply regardless of nature the homeowner’s relationship to the property.<sup>43</sup> Therefore, whether the outcome was intentional or unforeseen, it is squarely within the plain language.

## 2. Chapter 13

In contrast to a chapter 7 discharge, under chapter 13, a debtor obtains discharge through a payment plan approved by the courts.<sup>44</sup> While chapter 7 discharge is governed by only a single section, chapter 13 bankruptcy cases have two subsections of § 1328 that provide for the discharge of non-excepted debts.<sup>45</sup> Section 1328(a) provides for the typical chapter 13 discharge in which, upon completion of the plan, the debtor is discharged of liability for any other debts that arose prior to the bankruptcy petition.<sup>46</sup> Even when a debtor has not completed payment as required by the plan to make himself eligible for § 1328(a) discharge, the § 1328(b) “hardship discharge” applies in limited circumstances to discharge the debtor’s remaining outstanding debts.<sup>47</sup>

Discharge under § 1328(b) is “rare”<sup>48</sup> but broad, and is permitted under the following circumstances: when the debtor fails to make payments as a result of “circumstances for which the debtor should not justly be held accountable”; when creditors have already received an amount “not less than the amount that would have been paid” in the event of a full chapter 7 liquidation; and when modification of the plan is not practicable.<sup>49</sup> Section 523(a)(16) applies as usual to chapter 13 cases when discharge is affected by § 1328(b).<sup>50</sup> Unfortunately, just as in chapter 7 cases, a debtor in such a case may remain indefinitely liable for recurring HOA dues if the debtor cannot divest itself of

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<sup>42</sup> *E.g.*, Pigg v. BAC Home Loans Servicing, L.P. (*In re Pigg*), 453 B.R. 728, 732 (Bankr. M.D. Tenn. 2011); Arsenault v. JP Morgan Chase Bank, N.A. (*In re Arsenault*), 456 B.R. 627, 630 (Bankr. S.D. Ga. 2011).

<sup>43</sup> H.R. REP. No. 109-31, at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 154.

<sup>44</sup> 11 U.S.C. § 1321.

<sup>45</sup> *See id.* § 1328.

<sup>46</sup> *Id.* § 1328(a).

<sup>47</sup> *Id.* § 1328(b); *In re Edwards*, 207 B.R. 728, 729 (Bankr. N.D. Fla. 1997).

<sup>48</sup> *In re Heflin*, No. 09-18642, 2010 WL 1417776, at \*1 (Bankr. E.D. Va. Apr. 1, 2010).

<sup>49</sup> 11 U.S.C. § 1328(b).

<sup>50</sup> *Id.* § 523(a).

the property.<sup>51</sup> Therefore, § 523(a)(16) exhibits the same shortcomings in concert with § 1328(b) as it does with § 727.

Unfortunately, the effects of § 1328(a)'s omission from § 523(a) are not clarified in the Code, and the courts' varied reactions speak to the confusion that persists as courts continue to try to balance the language of the statute with the overarching goals of bankruptcy.<sup>52</sup> Despite Congress's efforts in both 1994 and 2005 to resolve the confusion surrounding postpetition HOA fees, the split of authority shows that this has not yet been accomplished.

### III. PROOF OF CLAIM

The § 523(a)(16) exception to discharge presents distinct problems for courts depending on whether the bankruptcy was brought under chapter 7 or chapter 13. The operation of the statute in each chapter will be addressed in turn. The Comment will conclude by suggesting changes to the statute to help restore the proper balance between protecting the interests of all parties involved in the bankruptcy case while ensuring that fairness and consistency are achieved across all chapters of the Code.

#### A. *The Chapter 7 Problem*

The application of § 523(a)(16) to chapter 7 cases where the debtor has surrendered real property encumbered by HOA fees yet not foreclosed upon poses the first problem.<sup>53</sup> The current provision does not distinguish between a homeowner who continues to live on the property and a homeowner who retains only a legal ownership interest while awaiting foreclosure.<sup>54</sup> Since the 2008 housing market crash, an increasing number of debtor-homeowners are at risk of nondischargeable liability for HOA dues despite no longer living on the

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<sup>51</sup> It does not appear that any such case has come before a court, but there is no reason to believe that the operation of the statute would be different from the corresponding chapter 7 circumstance.

<sup>52</sup> Compare *In re Colon*, 465 B.R. 657, 662–63 (Bankr. D. Utah 2011) (stating that Congress's intent “should not be inferred from the omissions or anything other than the plain meaning of the statute”), and *Foster v. Double R Ranch Ass'n (In re Foster)*, 435 B.R. 650 (B.A.P. 9th Cir. 2010) (concluding that § 523(a)(16) is inapplicable to the discharge under § 1328(a)), with *Maple Forest Condo. Ass'n v. Spencer (In re Spencer)*, 457 B.R. 601 (E.D. Mich. 2011) (determining dischargeability of postpetition HOA fees not by a § 523(a) analysis, but by looking at the timing of the debts).

<sup>53</sup> See, e.g., *Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011); *In re Brown*, No. 09-14949, 2011 WL 1322311, at \*3 (Bankr. D.N.J. Apr. 6, 2011).

<sup>54</sup> See 11 U.S.C. § 523(a)(16).

property or enjoying the benefits of membership.<sup>55</sup> Most troublingly, this liability could theoretically continue “in perpetuity.”<sup>56</sup>

This conflict between the plain language of the Code and the overarching goals of bankruptcy has caused a split in the courts.<sup>57</sup> Most express disapproval and concern over this unjust outcome but find no authority on which to base a decision that might take steps to solve the inequity.<sup>58</sup> While this is no comfort to a debtor saddled with an indefinite burden, such a decision does at least adhere to the Code. But at least one court has simply ignored the statutory language in favor of an equitable remedy, a resolution that had already been rejected by prior decisions, and which has since been criticized as impermissible judicial activism.<sup>59</sup>

Most courts have determined that judicial intervention is simply not the proper course of action, regardless of any apparently unfair outcome, because the statutory language is so clear.<sup>60</sup> Noting that a court “is required to rule according to the statute and not its sympathy,” one court held that “[w]hile [it did] not find the statute ambiguous, if it did it would find, based on the legislative history, that Congress intended that postpetition homeowners’ fees are forever nondischargeable [sic] irrespective of whether the debtor physically occupies the property.”<sup>61</sup> Another recognized that “[t]he legislative history of the 2005 amendment makes it clear that Congress intended to broaden the scope of protection for condominium associations under § 523(a)(16).”<sup>62</sup> The court continued: “While the [c]ourt is sympathetic to [the debtor’s]

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<sup>55</sup> See *Arsenault v. JP Morgan Chase Bank, N.A.* (*In re Arsenault*), 456 B.R. 627, 630 (Bankr. S.D. Ga. 2011); *Pigg*, 453 B.R. at 734–35.

<sup>56</sup> *Pigg*, 453 B.R. at 733.

<sup>57</sup> Compare *id.* (fashioning an equitable remedy to aid the debtor), with *In re Fristoe*, No. 10-32887, 2012 WL 4483891, at \*4 (Bankr. D. Utah Sept. 27, 2012) (refusing to grant relief “in direct contravention” of the Code), and *Brown*, 2011 WL 1322311, at \*2–3 (denying an equitable remedy).

<sup>58</sup> See, e.g., *Fristoe*, 2012 WL 4483891 (stating that granting such relief is “beyond the scope of the [c]ourt’s equitable powers under § 105(a); *Brown*, 2011 WL 1322311, at \*2–3 (expressing sympathy for debtor’s situation but enforcing the statute as written).

<sup>59</sup> See, e.g., *Allard v. G & P Enters., L.L.C.* (*In re Allard*), No. 11-1313, 2012 WL 2830158, at \*1 (Bankr. N.D. Cal. July 10, 2012); *Pigg*, 453 B.R. at 735–36.

<sup>60</sup> See, e.g., *Fristoe*, 2012 WL 4483891 (“The language of §§ 362 and 363 are clear, and in this case, granting the relief requested by the [d]ebtors would be in direct contravention of the Bankruptcy Code”); *Allard*, 2012 WL 2830158, at \*1 n.2 (noting that the debtor essentially requested that the 1994 amendment be applied, and stating “That is not the proper role of the court.”); *Brown*, 2011 WL 1322311, at \*2–3 (“While the Court is sympathetic to [the debtor’s] circumstances, it has no alternative but to interpret and enforce the statute as written by Congress.”).

<sup>61</sup> *Allard*, 2012 WL 2830158, at \*1–2.

<sup>62</sup> *Brown*, 2011 WL 1322311, at \*2.

circumstances, it has no alternative but to interpret and enforce the statute as written by Congress.”<sup>63</sup> A third court acknowledged that the creditor’s inaction

[does] not make things easy for the [debtors]. Forces remained at work that could make their continued ownership of the real estate uncomfortable . . . . But those forces are incidents of ownership . . . . And although the Code provides a discharge of personal liability for debt, it does not discharge the ongoing burdens of owning property.<sup>64</sup>

The fact that numerous courts have expressed concern that an incurable inequity is done through a plain-meaning application of the Code’s provisions might on its own be persuasive evidence that another amendment is necessary. Judicial intervention is undeniably a faster option, but congressional action is the only permissible avenue for rulemaking, if indeed no means of solving the problem is available within the express interpretive power of the courts. One court has nevertheless attempted to solve the problem despite the absence of any congressional intervention. In *Pigg v. BAC Home Loans Servicing (In re Pigg)*, the court circumvented the plain meaning of the Code in an effort to arrive at a fair result.<sup>65</sup> This case is a striking example of the tension between arriving at a fair result and the result warranted by the plain meaning of the Code.<sup>66</sup>

In *Pigg*, the debtor vacated her home as part of her bankruptcy filing.<sup>67</sup> The property had been badly damaged in a flood, and the debtor expressed her intent to surrender the property to the secured creditor holding the claim.<sup>68</sup> An agent of the bank changed the locks and placed a notice in the front window of the home, prohibiting entry, but when the bank took no further action, the debtor asked the court to force the bank to accept the deed to the property or to foreclose so as to “cut[] off any further accumulating liability for HOA fees.”<sup>69</sup> The court recognized that it “[was] not able to discharge what Congress [had] legislated to be nondischargeable,” but for the sake of equity, it fashioned a unique remedy whereby it forced a sale of the property and distributed the proceeds to the creditors.<sup>70</sup> It rationalized this action by finding “that the

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<sup>63</sup> *Id.*

<sup>64</sup> *Canning v. Beneficial Me., Inc. (In re Canning)*, 442 B.R. 165, 172 (Bankr. D. Me. 2011).

<sup>65</sup> *Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011).

<sup>66</sup> *Id.* at 735–36.

<sup>67</sup> *Id.* at 731.

<sup>68</sup> *Id.* at 730–31.

<sup>69</sup> *Id.* at 731–32.

<sup>70</sup> *Id.* at 735.

[b]ank and the HOA [had] consented to the sale by their inaction,” allowing the court to formulate a remedy to “balance[] the rights of the lienholders and the right of a debtor to a fresh start.”<sup>71</sup>

The court in *Pigg* justified its creative and unusual steps by arguing that changed circumstances have since made Congress’s 2005 amendments insufficient to protect all interests in a bankruptcy case.<sup>72</sup> There is no question that the changes have occasionally led to various situations that have left the debtor in a “predicament”<sup>73</sup> or “quagmire”<sup>74</sup> that amounted to less than bankruptcy’s promised “fresh start.”<sup>75</sup> These situations, according to the *Pigg* opinion, “could not have [been] foreseen” prior to the “financial crisis that crashed Wall Street, sunk the real estate market, and affected, to some degree, almost every American. With the real estate collapse, lenders, who otherwise have the right to do so, are choosing not to foreclose on their collateral[,] leaving homeowners in limbo.”<sup>76</sup> As one commentator noted, “[A] protracted foreclosure process may actually keep a debtor from realizing the full benefit of a fresh start in bankruptcy.”<sup>77</sup> The court in *Pigg* simply rejected that the legislative intent, however clear it may have been, would have been to put a debtor in such a position.<sup>78</sup>

In spite of its declaration that the change in the economic climate should materially influence the way the expressed legislative intent is to be viewed, the court struggled to identify any convincing authority that would provide it with the power to push back against this change in external circumstances. The court settled on the equitable power granted by § 105(a), even while other courts, in cases decided both before and after *Pigg*, rejected the same reasoning.<sup>79</sup>

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<sup>71</sup> *Id.* at 736.

<sup>72</sup> *Id.* at 733–34.

<sup>73</sup> *Allard v. G & P Enters., L.L.C. (In re Allard)*, No. 11-1313, 2012 WL 2830158, at \*1 (Bankr. N.D. Cal. July 10, 2012).

<sup>74</sup> *In re Colon*, 465 B.R. 657, 663 (Bankr. D. Utah 2011).

<sup>75</sup> *In re Brown*, No. 09-14949, 2011 WL 1322311, at \*2–3 (Bankr. D.N.J. Apr. 6, 2011); *Canning v. Beneficial Me., Inc. (In re Canning)*, 442 B.R. 165, 172 (Bankr. D. Me. 2011); *Pigg*, 453 B.R. at 733, 735.

<sup>76</sup> *Pigg*, 453 B.R. at 733.

<sup>77</sup> Ariane Holtschlag, *Assessing § 523(a)(16)*, AM. BANKR. INST. J., June 2012, at 16.

<sup>78</sup> *Pigg*, 453 B.R. at 733–34.

<sup>79</sup> *In re Fristoe*, No. 10-32887, 2012 WL 4483891, at \*4 (Bankr. D. Utah Sept. 27, 2012) (stating that granting such relief is “beyond the scope of the [c]ourt’s equitable powers under § 105(a); *Brown*, 2011 WL 1322311, at \*2–3 (expressing sympathy for debtor’s situation but enforcing the statute as written); *see also* 11 U.S.C. § 105(a) (2012).

Section 105(a) provides the bankruptcy court with broad, but not unlimited, discretionary power.<sup>80</sup> Two portions of this provision are especially relevant. First, a court is permitted to take any action necessary “to carry out the provisions of this title.”<sup>81</sup> Second, the last sentence seems to contemplate primarily procedural inequities—enforcement of court orders or rules and abuse of process—rather than substantive ones.<sup>82</sup> The court in *Pigg* seemed to convince itself over the course of the opinion that it had the authority to make this decision, but in doing so undermined its own argument. In introducing § 105(a), the court acknowledged that the provision granting courts this “power is constrained by the provisions of the [] Code.”<sup>83</sup> Yet the court used the power purportedly given by this section to ignore a substantive provision, which it called a “legislated wrong without a remedy.”<sup>84</sup>

While it may be a well-known maxim that “equity will never suffer a wrong without a remedy,”<sup>85</sup> there are some problems with its application here. First, regardless of the powers a court has in equity, it nevertheless “must rule in accordance with the [] Code.”<sup>86</sup> All other courts facing this issue have acknowledged this explicitly.<sup>87</sup> A court is simply not empowered to ignore clear statutory language.<sup>88</sup> Second, the statement<sup>89</sup> referred to an ancient<sup>90</sup>

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<sup>80</sup> See 11 U.S.C. § 105(a) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”) (emphasis added).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Pigg*, 453 B.R. at 735 (citing *Childress v. Middleton Arms, L.P. (In re Middleton Arms, L.P.)*, 934 F.2d 723, 724 (6th Cir. 1991)); see also 11 U.S.C. § 105(a) (noting that equity extends only as far as necessary “to carry out the provisions of this title”).

<sup>84</sup> See *Pigg*, 453 B.R. at 735.

<sup>85</sup> *Id.* (alterations in original) (quoting *May v. Carlton*, 245 S.W.3d 340, 356 (Tenn. 2008) (Koch, J., dissenting)).

<sup>86</sup> *In re Fristoe*, No. 10-32887, 2012 WL 4483891, at \*4 (Bankr. D. Utah Sept. 27, 2012) (citing *Tuttle v. United States (In re Tuttle)*, 291 F.3d 1238, 1245 (10th Cir. 2002)).

<sup>87</sup> *Allard v. G & P Enters., L.L.C. (In re Allard)*, No. 11-1313, 2012 WL 2830158, at \*1 (Bankr. N.D. Cal. July 10, 2012); *Fristoe*, 2012 WL 4483891, at \*4; *In re Brown*, No. 09-14949, 2011 WL 1322311, at \*3 (Bankr. D.N.J. Apr. 6, 2011); *Canning v. Beneficial Me., Inc. (In re Canning)*, 442 B.R. 165, 172 (Bankr. D. Me. 2011); see *In re Heck*, No. 09-31512, 2011 WL 133015, at \*1–2 (Bankr. N.D. Cal. Jan. 13, 2011).

<sup>88</sup> See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (“[W]here . . . the statute’s language is plain, ‘the sole function of the court is to enforce it according to its terms.’” (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))). See also *Tuttle v. United States (In re Tuttle)*, 291 F.3d 1238, 1245 (10th Cir. 2002) (“While . . . equitable arguments are compelling, they cannot overcome the plain language of the Code.”).

<sup>89</sup> In fact, the quoted assertion that “equity will never suffer a wrong without a remedy” does not even appear in the case cited. *May v. Carlton*, 245 S.W.3d 340, 355 (Tenn. 2008). The statement to which it likely referred came from Justice Koch’s dissent, and it is that quotation which I argue undermines *Pigg*’s claim that it possesses the necessary authority to decide in this way. Compare *Pigg*, 453 B.R. at 735 (citations omitted) (stating that “equity will never suffer a wrong without a remedy”), with *May*, 245 S.W.3d at 355 (referring to

Tennessee Supreme Court case that allowed a court to exercise its discretion to overcome inequity “if by law there is any means provided by which it can be set aside and avoided.”<sup>91</sup> Furthermore, that case dealt with an apparent inequity in a death penalty case;<sup>92</sup> as life-altering as bankruptcy can be, clearly death penalty cases might justify more judicial activism in certain situations. As the courts in similar cases have found, there is simply no “means provided by which it can be . . . avoided” while remaining within the Code’s contemplated limits.<sup>93</sup> Even according to the original court’s support, then, the equitable powers claimed do not extend as far as *Pigg* took them.

In modern cases on point, courts have refused to interpret the duty of a court of equity so loosely as to ignore a statute to the extent done in *Pigg*. Judicial power can extend only so far even in the face of the types of inequity that caused the court in *Pigg* to overreact and overreach.<sup>94</sup> The approach adopted in *Pigg* has been criticized, directly and indirectly, as overstepping the judicial role.<sup>95</sup> Clearly this is counter to congressional intent. A few courts have gone so far as to note that debtors seeking relief similar to that given by the court in *Pigg* are effectively requesting an application of the pre-2005 statute.<sup>96</sup> At least one has directly questioned *Pigg*’s justification under § 105(a), noting that the Tenth Circuit has “reasoned that ‘[t]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [a statute] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts.’”<sup>97</sup>

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the “ancient maxim that there should be no wrong without a remedy” (citing *Bob v. State*, 10 Tenn. 173, 176 (1826))).

<sup>90</sup> *May*, 245 S.W.3d at 355 (Koch, J., dissenting).

<sup>91</sup> *Bob*, 10 Tenn.at 176.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *In re Fristoe*, No. 10-32887, 2012 WL 4483891, at \*4 (Bankr. D. Utah Sept. 27, 2012).

<sup>95</sup> *Moore v. BAC Home Loan Servicing, L.P. (In re Moore)*, 477 B.R. 918, 920–21 (Bankr. S.D. Ga. 2012).

<sup>96</sup> *Allard v. G & P Enters., L.L.C. (In re Allard)*, No. 11-1313, 2012 WL 2830158, at \*1 (Bankr. N.D. Cal. July 10, 2012) (noting that the debtor is essentially requesting that the 1994 amendment be applied, and concluding, “That is not the proper role of the court.”); *Fristoe*, 2012 WL 4483891, at \*4 (“Under the pre-BAPCPA statutory scheme, the [d]ebtors’ obligations to pay the HOA fees would be dischargeable as the [d]ebtors do not reside, rent, or even have access to the [p]roperties.”).

<sup>97</sup> *Fristoe*, 2012 WL 4483891, at \*3 (alterations in original) (quoting *Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258, 1263 (10th Cir. 2008) (citations omitted)).

In *Pigg*, the court attempted to argue that the ends justified the means, even though other courts have explicitly avoided its methods.<sup>98</sup> Simply put, the court was undisciplined in its pursuit of equity, and encroached on the realm of congressional lawmaking.<sup>99</sup> This creative effort to overcome legislative shortcomings achieved its goals only through impermissible means. Therefore, if an alternative unexplored by a court does not exist, then a solution is available only through congressional action.

Perhaps a more acceptable alternative would have been for the court to focus primarily on the fact that the creditor in the case had actually taken control of the property, a factual scenario absent in the vast majority of comparable cases. The court in *Pigg* could have concluded that seizing the property gave it “interest” in the property within the meaning of the Code.<sup>100</sup> This alternative would have narrowed the degree to which *Pigg* adjusted the plain language to reach its desired outcome. That way, rather than disregarding the statutory provision altogether, the court would have at least had an argument that its decision remained within the realm of statutory interpretation as a determination of the meaning of “interest in the property.”<sup>101</sup>

In fact, two cases have mentioned similar arguments in deciding chapter 13 cases.<sup>102</sup> In the first, *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*, the court used this characteristic to distinguish *Pigg* and explain why it was unwilling to force a sale of a property in a chapter 13 case.<sup>103</sup> In the second, *In re Colon*, the court used a narrowed definition of ownership “interest” in construing what was necessary to trigger a continued obligation

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<sup>98</sup> *Allard*, 2012 WL 2830158, at \*1 (noting that the debtor is essentially requesting that the 1994 amendment be applied, and stating “That is not the proper role of the court.”); *In re Brown*, No. 09-14949, 2011 WL 1322311, at \*3 (Bankr. D.N.J. Apr. 6, 2011) (“While the court is sympathetic to [the debtor’s] circumstances, it has no alternative but to interpret and enforce the statute as written by Congress.”).

<sup>99</sup> *Fristoe*, 2012 WL 4483891, at \*3 (Bankr. D. Utah Sept. 27, 2012) (quoting *Scriver*, 535 F.3d at 1263).

<sup>100</sup> See 11 U.S.C. § 523(a)(16) (2012).

<sup>101</sup> *Id.*

<sup>102</sup> *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*, 456 B.R. 627 (Bankr. S.D. Ga. 2011) (specifying that in *Pigg*, the only case cited as standing in opposition to the conclusion in *Arsenault*, the bank had “actively taken possession of the property,” while under the facts before that court “[t]here [were] no allegations that [creditor] ha[d] taken possession of the [p]roperty.”); *In re Colon*, 465 B.R. 657, 663 (Bankr. D. Utah 2011).

<sup>103</sup> *Arsenault*, 456 B.R. at 627 (stating that HOA fees are “incidents of ownership” and that the Code does not “discharge the ongoing burdens of owning property” (quoting *Canning v. Beneficial Me., Inc. (In re Canning)*, 442 B.R. 165, 172 (Bankr. D. Me. 2011))).

arising from a covenant running with the land.<sup>104</sup> *Colon* distinguished the owners' rights and obligations to a home they had abandoned from the rights to a home in which they continued to live.<sup>105</sup> The court noted that, after surrendering the property in bankruptcy, "the [d]ebtors ha[d] no consequential interest in the [p]roperty that measure[d] up to rights to exercise ownership interests and control," "[d]espite the fact that the [d]ebtors [were] listed on the title to the property."<sup>106</sup>

*Arsenault* did not examine *Pigg* in detail, but merely offered it as one counterexample containing a material difference in facts.<sup>107</sup> Still, the lack of an express disapproval of *Pigg* suggests that a more narrow focus might have been a less egregious encroachment into the legislative realm. That said, the problem with applying a chapter 13 interpretation, like *Colon*'s, to a chapter 7 case like *Pigg*, is that § 523(a)(16) does not apply to the majority of chapter 13 cases in the first place. As such, the court in *Colon* was free to interpret what type of interest was sufficient to trigger liability, while *Pigg* should have been bound by the terms provided in the Code.<sup>108</sup> No matter the court's argument in *Pigg*, such a reading would still likely be in opposition to the plain meaning of the statute; if being "listed on the title to the property" is not a "legal" interest under § 523(a)(16),<sup>109</sup> it is difficult to imagine what would meet that standard. Still, at least such an argument would have left the court in its normal place as an interpreter of statutory language,<sup>110</sup> although this interpretation would still likely have been unreasonable.

Overall the fact that even this narrow variance from the clear path laid out by Congress would most likely fail to solve the problem, despite remaining within the rightful bounds of judicial authority, only further suggests that the exception as presently defined does too little to distinguish among the varying degrees of ownership and the differing interests of homeowners and creditors. If *Pigg* were indeed sufficient to overcome the inequities caused by the statutory language, then perhaps Congress could go on without revisiting

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<sup>104</sup> *Colon*, 465 B.R. at 663. Although *Colon* was a § 1328(a) case, it used its understanding of the terms "legal, equitable, or possessory" in a way that could nevertheless be applied to a chapter 7 case. *See id.* For a discussion on how *Colon* distinguished its holding from that of *Foster*, see *infra* notes 174–80.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Arsenault*, 456 B.R. at 630.

<sup>108</sup> *See Colon*, 465 B.R. at 663.

<sup>109</sup> *Id.*

<sup>110</sup> *In re Brown*, No. 09-14949, 2011 WL 1322311, at \*3 (Bankr. D.N.J. Apr. 6, 2011) (holding that the court "has no alternative but to interpret and enforce the statute as written by Congress").

§ 523(a)(16). Unfortunately, the actions taken by the court in *Pigg* overstepped the boundaries of judicial power.<sup>111</sup> Therefore, Congress must adjust the Code to prevent the injustice *Pigg* attempted to eliminate.

### B. The Chapter 13 Problem

Unlike the chapter 7 cases discussed above, where the Code gave a clear instruction that was simply out of line with a basic understanding of fairness, when dealing with postpetition HOA dues under chapter 13, the problem is really one of consistency in statutory interpretation. Courts have largely been able to plausibly interpret the statutory language so as to discharge postpetition assessments when fairness seems to require it,<sup>112</sup> while at the same time avoiding a windfall for the debtor who remains in possession of the home after bankruptcy.<sup>113</sup> The problem arises out of the fact that to reach these intuitively fair conclusions, courts have applied arguments that directly contradict one another.<sup>114</sup> This outcome is disfavored because, in general, “uniformity is an important concern in federal statutory interpretation.”<sup>115</sup> In short, courts have exploited the statute’s ambiguities opportunistically, forming opinions that seem on their own to be reasonable interpretations, while in fact there is no single principle guiding the various opinions.<sup>116</sup>

While a split may be unproblematic in some areas of law, uncertainty as to the obligations and risks associated with real estate investments may change lender behavior. Overreaching court opinions may return HOAs to the pre-amendment position of lacking any continuing sources of income with which to fund ongoing service to those homeowners who have not abandoned their

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<sup>111</sup> *Pigg v. BAC Home Loans Servicing (In re Pigg)*, 453 B.R. 728, 733 (Bankr. M.D. Tenn. 2011).

<sup>112</sup> *See Colon*, 465 B.R. at 663 (noting that debtors were not enjoying benefits of the HOA and the property itself when they surrendered the property and leaving them liable for the HOA fees would be inequitable). *But see* *Maple Forest Condo. Ass’n v. Spencer (In re Spencer)*, 457 B.R. 601, 614–15 (E.D. Mich. 2011) (stating that “in the absence of any attempt by [d]ebtor to effect transfer ownership of the property by tendering a deed in lieu of foreclosure or otherwise,” there is no reason to force the secured creditor to take title to the property).

<sup>113</sup> *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650 (B.A.P. 9th Cir. 2010) (doubting that the “omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a)” when the debtor is not vacating property).

<sup>114</sup> *Compare Colon*, 465 B.R. at 663 (stating that it did not need address the issue of whether the covenants ran with the land under the state law), *with Foster*, 435 B.R. at 650 (stating that § 523(a)(16) is inapplicable to discharge under § 1328(a) and vice versa and determining dischargeability of HOA fees through analysis of whether covenant to pay HOA dues ran with the land).

<sup>115</sup> *Minasyan v. Gonzales*, 401 F.3d 1069, 1076 (9th Cir. 2005) (citing *Kahn v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994)).

<sup>116</sup> *Supra* note 114.

properties or defaulted on their debts; this would undo the broader protection that Congress explicitly intended.<sup>117</sup> This is particularly troublesome considering the express intention of Congress in passing the 2005 amendment.<sup>118</sup> The existence of the amendment is proof that the concern was substantial enough to warrant congressional intervention, and courts cannot be allowed to undo this.<sup>119</sup>

A peculiarity in the execution of discharge under § 1328(a) provides the opportunity for the type of judicial rulemaking that has caused all this confusion. In contrast to the chapter 7 problem, which stems from a congressional addition to § 523(a)(16), the chapter 13 problem emerged as a result of something Congress did *not* include: a provision applying the § 523(a)(16) exception to discharges effected under § 1328(a).<sup>120</sup> Instead, § 1328(a) discharge purports to free the debtor of liability for any debt not excepted by other various § 523(a) provisions or a handful of additional § 1328 exceptions, which do not include § 523(a)(16).<sup>121</sup>

Many courts facing this situation have favored a purposivist reading of the Code to avoid a situation that would enable a chapter 13 debtor to retain ownership of real property while discharging all future assessments incidental to that ownership.<sup>122</sup> Judges have therefore turned to various alternative doctrines in an effort to avoid such a windfall for a debtor.<sup>123</sup> These purposivist cases have “decline[d] to infer that by *not* expressly connecting these unrelated sections, Congress intended to broaden the § 1328(a) discharge to include assessments that are excluded from other types of bankruptcy discharges.”<sup>124</sup>

The reasoning favored by such cases focuses on the stated legislative intent in adding § 523(a)(16), which was to resolve a split of authority as to whether association fees were dischargeable if they came due after a chapter 7 petition

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<sup>117</sup> H.R. REP. NO. 109-31, at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 154.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See* 11 U.S.C. § 523(a)(16) (2012) (failing to include § 1328(a) to the discharge exception).

<sup>121</sup> *See id.* §§ 523(a); 1328(a).

<sup>122</sup> *See, e.g., Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010) (“Our challenge is to harmonize the policy behind the discharge exception in § 523(a)(16) of protecting homeowner’s associations with the policy under [c]hapter 13 that supports home ownership.”).

<sup>123</sup> *See, e.g., Maple Forest Condo. Ass’n v. Spencer (In re Spencer)*, 457 B.R. 601, 611–13 (E.D. Mich. 2011); *Foster*, 435 B.R. at 659.

<sup>124</sup> *Heffner v. Elmore, Throop & Young, P.C.*, No. 11-3369, 2012 WL 2138097 (D. Md. June 12, 2012) (citing *Foster*, 435 B.R. at 659).

was filed.<sup>125</sup> Furthermore, “Congress stated that the provision was intended ‘to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor’s interest’” in a property governed by such an association.<sup>126</sup> Having thus determined that the omission of § 523(a)(16) from the list of applicable exceptions to § 1328(a) discharge was not instructive, these courts then set out to determine how best to forge a rule unencumbered by Congressional input.

Perhaps the most prominent of these purposivist § 1328(a) cases is *Foster v. Double R Ranch Association (In re Foster)*.<sup>127</sup> In *Foster*, the debtor attempted to retain possession of a property after bankruptcy while at the same time arguing that his HOA fees were dischargeable as part of his chapter 13 plan.<sup>128</sup> The debtor made two arguments: “(1) the discharge exception under § 523(a)(16) governing postpetition HOA dues is inapplicable to § 1328(a); and, (2) the postpetition HOA dues arose out of a prepetition contract with the Association and are thus prepetition debts which are dischargeable under the holding of *In re Rosteck*.”<sup>129</sup> The court agreed with the first contention, finding the exceptions inapplicable,<sup>130</sup> but rejected the argument that this was indicative of congressional intent to permit discharge of such debts.<sup>131</sup> The court reasoned:

We recognize that the discharge provision under chapter 13 is broader than that in chapter 7. However, we doubt the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under chapter 13 to stay in his or her property after the order for relief.<sup>132</sup>

This purposivist reading was bolstered by the view that the “challenge is to harmonize the policy behind the discharge exception in § 523(a)(16) of protecting homeowners’ associations with the policy under [c]hapter 13 that supports homeownership.”<sup>133</sup> The question, therefore, rested on “whether the

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<sup>125</sup> *Liberty Cmty. Mgmt., Inc. v. Hall (In re Hall)*, 454 B.R. 230 (Bankr. N.D. Ga. 2011) (citing 4 COLLIER ON BANKRUPTCY ¶ 523.24 (Alan N. Resnick and Henry J. Sommer, eds., 2010)).

<sup>126</sup> *Id.* (quoting H.R. REP. No. 109-31, at 88 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 154).

<sup>127</sup> *Foster*, 435 B.R. at 650.

<sup>128</sup> *Id.* at 653–54.

<sup>129</sup> *Id.* (citing *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990)).

<sup>130</sup> *Id.* at 657–58.

<sup>131</sup> *Id.* at 659.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

condominium declaration and corresponding documents are simply a contract or constitute a covenant running with the land.”<sup>134</sup> This, according to *Foster*, was a question of state law.<sup>135</sup>

Thus, the court instead adopted the reasoning of the case that chiefly opposed *In re Rosteck*<sup>136</sup> prior to the implementation of § 523(a)(16): *In re Rosenfeld*.<sup>137</sup> Under that decision, the duty to pay HOA fees and the like arose out of a covenant running with the land, rather than from a prepetition contractual obligation.<sup>138</sup> According to *Foster*, this rule applied under Washington law because the agreement requiring dues to be paid to the HOA “[was] not a contract, but ‘a document that unilaterally create[d] a type of real property.’”<sup>139</sup> In other words, “as a matter of law, debtor’s personal liability for HOA dues continue[d] postpetition as long as he maintain[ed] his legal, equitable or possessory interest in the property and [was] unaffected by his discharge,” making the payments nondischargeable under § 1328(a).<sup>140</sup> The rule was summarized as follows: “[Y]ou stay, you pay.”<sup>141</sup>

While *Foster* was limited to ensuring homeowners were not able to retain their property and discharge the debts that continued to accrue during the ownership, another court went even further in its purposivist interpretation of § 1328(a).<sup>142</sup> *Maple Forest Condominium Ass’n v. Spencer (In re Spencer)* is another case involving discharge under § 1328(a), but here the debtor vacated his condominium around the time of his bankruptcy filing.<sup>143</sup> The court described the primary issue as “ultimately depend[ing] upon whether the [postpetition] assessments of condominium fees constitute dischargeable [prepetition] debts or nondischargeable [postpetition] debts.”<sup>144</sup> Even though

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<sup>134</sup> *Affeldt v. Westbrooke Condo. Ass’n (In re Affeldt)*, 60 F.3d 1292, 1296 (8th Cir. 1995).

<sup>135</sup> *Foster*, 435 B.R. at 659–60 (When “there is no statutory default rule regarding an exception to discharge for postpetition HOA dues,” the substance of what constitutes a claim is left to state law); *see also* *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (declining to decide a case because “[p]roperty interests are created and defined by state law,” and “Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law.”).

<sup>136</sup> In fact, these two cases were the main decisions that exemplified the split of authority prompting Congress to step in and add § 523(a)(16). *Ricotta*, *supra* note 4, at 191–94.

<sup>137</sup> *Foster*, 435 B.R. at 660.

<sup>138</sup> *River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 837 (4th Cir. 1994).

<sup>139</sup> *Foster*, 435 B.R. at 659–60 (quoting *Bellevue Pac. Ctr. Condo. Owners Ass’n v. Bellevue Pac. Tower Condo. Ass’n*, 124 Wash. App. 178, 188 (Ct. App. 2004)).

<sup>140</sup> *Id.* at 661.

<sup>141</sup> *Id.* (internal quotation marks omitted).

<sup>142</sup> *See Maple Forest Condo. Ass’n v. Spencer (In re Spencer)*, 457 B.R. 601 (E.D. Mich. 2011).

<sup>143</sup> *Id.* at 604.

<sup>144</sup> *Id.* at 605.

“the language [of the Code] has been read to require the broadest available definition of claim[,] . . . [i]t does not follow, however, that the definition of claim is unbounded. To the contrary, there is no claim without a right to payment, however uncertain.”<sup>145</sup>

Like the court in *Foster*, the court in *Spencer* began its discussion with an examination of state law to determine whether contract or property rights governed the original obligation to pay.<sup>146</sup> This analysis, as in *Foster*, followed a rejection of the view that § 523(a)(16) implied a statutory definition of claim that expanded as far as postpetition assessments, making them dischargeable in the absence of an exception.<sup>147</sup> The court found the debt to have arisen out of property law rather than contract.<sup>148</sup> However, it also noted that “the obligation to pay the assessed fees depends upon whether [d]ebtor remained the owner of the property at all relevant times.”<sup>149</sup> These obligations included the necessity “to pay periodic assessments by the [HOA] arising from a covenant running with the land.”<sup>150</sup> Although the debtor’s declared intent was to surrender the property, the court reasoned that ownership of real property must be transferred by a written document, and that verbal intent to surrender property does no more than “establish that [d]ebtor will not oppose the transfer of collateral.”<sup>151</sup> The court held that the chapter 13 debtor was held liable for postpetition HOA fees despite vacating the property,<sup>152</sup> a reading that took the running covenant line of authority even further than *Foster*.

*Foster* and *Spencer* focused on Congress’s intent to effectively reach a conclusion consistent with what would have been the outcome had § 523(a)(16) been applicable to a § 1328(a) discharge. A plain language approach would yield a different result. This is because in the *Foster* and *Spencer* decisions, the courts ignored well-regarded canons of statutory construction. The plain language of the Code suggests that all debts not excepted from discharge are, virtually by definition, dischargeable.<sup>153</sup> This

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<sup>145</sup> *Id.* at 605–06.

<sup>146</sup> *Butner v. United States*, 440 U.S. 48, 55 (1979)) (“Although the [] Code determines the extent of claims and discharge of debts, the determination of property rights and enforceable obligations is left to state law.”); *Spencer*, 457 B.R. at 609 (citing *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 20 (2000)).

<sup>147</sup> *Spencer*, 457 B.R. at 608.

<sup>148</sup> *Id.* at 611.

<sup>149</sup> *Id.* at 611–12.

<sup>150</sup> *Id.* at 612–13.

<sup>151</sup> *Id.* at 612.

<sup>152</sup> *Id.* at 615–16.

<sup>153</sup> 11 U.S.C. §§ 727(a), 1328(a) (2012).

understanding of the Code gives far more importance to the fact that § 523(a)(16) explicitly does not apply in cases where discharge is governed by § 1328(a).<sup>154</sup> This intuition is reflected in the semantic canon of statutory construction, *expressio unius*, which prescribes that “when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded.”<sup>155</sup> In this context, the canon applies on two different levels. First, by omitting § 1328(a) from the list of sections to which all of the § 523(a) exceptions apply,<sup>156</sup> Congress implicitly expressed an intention to allow discharge of postpetition assessments when discharge is governed by § 1328(a). Second, by specifically applying other § 523(a) exceptions to § 1328(a) discharge,<sup>157</sup> Congress again implied that this was a conscious decision made with regard to one specific exception and one specific class of discharge.

Textualist courts have applied an analysis that an HOA obligation can only be dischargeable if it is recognized as a claim under the Code.<sup>158</sup> Various courts have responded to the question with the initial observation that the “Code broadly defines a claim,”<sup>159</sup> and that “the United States Supreme Court has recognized that Congress intended . . . to adopt the broadest available definition of claim.”<sup>160</sup> Some courts note that “the Code ‘contemplates that all legal obligations of the debtor[, no matter how remote or contingent,] will be able to be dealt with in the bankruptcy case.’”<sup>161</sup>

In keeping with this rule, a recent case noted “that postpetition HOA assessments are claims under the Code, despite the fact that at the time of the plan’s confirmation they are not yet ‘fixed’ or ‘matured’ and remain ‘contingent.’”<sup>162</sup> Having concluded that the assessments in question could be

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<sup>154</sup> *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 658 (B.A.P. 9th Cir. 2010).

<sup>155</sup> JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 224 (Robert D. Clark et al. eds., 12th ed. 2010).

<sup>156</sup> *See* 11 U.S.C. § 523(a) (lacking inclusion of § 1328(a) in its discharge exceptions).

<sup>157</sup> *Id.* § 1328(a) (excepting debts “of the kind specified” in § 523(a)(1)(B)–(C), (2)–(5), (8), (9)).

<sup>158</sup> *See, e.g., In re Hawk*, 314 B.R. 312, 315 (Bankr. D.N.J. 2004) (“[T]he court must determine if the [postpetition] condominium assessments are a claim that arose before the commencement of the case.”).

<sup>159</sup> *In re Kelly*, No. 09-42376, 2010 WL 1740739, at \*1 (N.D. Cal. Apr. 28, 2010) (citing *In re Rosteck*, 899 F.2d 694, 696 (7th Cir. 1990)).

<sup>160</sup> *Hawk*, 314 B.R. at 315 (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (citation omitted) (internal quotation marks omitted)).

<sup>161</sup> *In re Mattera*, 203 B.R. 565, 571 (Bankr. D.N.J. 1997) (alteration in original) (quoting *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1977) (citations omitted)).

<sup>162</sup> *In re Colon*, 465 B.R. 657, 663 (Bankr. D. Utah 2011) (quoting *In re Turner*, 101 B.R. 751, 754 (Bankr. D. Utah 1989)). Although *Turner* was a pre-1994 amendment, chapter 7 case, the court in *Colon* determined that while “[t]he congressional amendments to § 523(a)(16) did supersede *Turner*’s contention that

rightly defined as claims arising out of a prepetition contractual arrangement under the Code, these courts have held that all such debts can be discharged under chapter 13 in accordance with § 1328(a), in the absence of a provision to the contrary.<sup>163</sup> Other courts disagree with this analysis and find that the debtor is provided a windfall with such reasoning.<sup>164</sup> Still, at least one court was willing, at least implicitly, to accept this reading of the Code when necessary to avoid the same injustice avoided by the equitable remedy constructed in *Pigg*.<sup>165</sup>

That case, *In re Colon*, came to a conclusion that is compatible with the catchphrase portion of the *Foster* decision, but at odds with the *Spencer* decision: in *Colon* the debtors did not “stay,” and the court determined their postpetition debts to be dischargeable.<sup>166</sup> Like in *Foster*, the *Colon* court found that unless specifically identified, the § 523(a) exceptions, including § 523(a)(16), do not apply to § 1328(a) cases.<sup>167</sup> The court in *Colon* diverged by finding the dues dischargeable because they were claims provided for under the chapter 13 plan.<sup>168</sup> Unless excepted, claims provided for by the plan are dischargeable,<sup>169</sup> and the plain language of § 523(a) did not apply the exceptions to the type of case before the court in *Colon*.<sup>170</sup> After finding § 523(a)(16) inapplicable, the court chose not to proceed to the primary question examined in *Foster*: whether the HOA fees were incidental to a running covenant under the governing state law.<sup>171</sup> Instead, the court skipped this step altogether:

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in a chapter 7 case, HOA postpetition assessments are [nondischargeable] under § 727 . . . the Amendments did not disturb *Turner*'s contention that HOA postpetition assessments are ‘claims’ under the Code and thus subject to discharge. *Id.*

<sup>163</sup> *Id.*; *Turner*, 101 B.R. at 754.

<sup>164</sup> *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010) (rejecting argument that § 523(a)(16) establishes generally that postpetition HOA dues are claims or debts that can be discharged).

<sup>165</sup> See *Colon*, 465 B.R. at 663 (rendering vacating debtor’s postpetition HOA fees dischargeable); *Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728, 734–35 (Bankr. M.D. Tenn. 2011).

<sup>166</sup> *Colon*, 465 B.R. at 662–63.

<sup>167</sup> *Id.* at 662.

<sup>168</sup> *Id.* Although part of the *Turner* holding was superseded by the 1994 and 2005 amendments to the Code, in that it was a § 727 case which found postpetition assessments dischargeable as the “‘periodic maturing of . . . prepetition claim[s],” the court opinion noted that the court’s finding that HOA postpetition assessments were claims under the Code was undisturbed. *Id.* at 661 (quoting *Turner*, 101 B.R. at 754).

<sup>169</sup> 11 U.S.C. § 1328(a) (2012) (“[T]he court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under [§] 502 of this title, except any debt” falling under various enumerated exception provisions, including a group of listed § 523(a) subsections, of which § 523(a)(16) is not one.).

<sup>170</sup> *Id.* § 523(a).

<sup>171</sup> *Colon*, 465 B.R. at 663.

The [c]ourt [did] not address the issue of whether [covenants] run with the land under Utah state law. Despite the fact that the [d]ebtors are listed on the title to the property, the [c]ourt finds that the [d]ebtors have no consequential interest in the [p]roperty that measures up to rights to exercise ownership interests and control. Because the [c]ourt finds that postpetition HOA assessments are dischargeable under § 1328(a), [the creditor] cannot pursue the [d]ebtors for collection of those assessments and the stay should not be modified to allow the same.<sup>172</sup>

Thus, although it purported to distinguish itself from *Foster, Colon* in fact took a position incompatible with that case. In *Foster*, the court made it clear that the decisive question was whether the obligation to pay arose from a running covenant or a contract, as the former would remain postpetition while the latter would have become an obligation prior to the filing of the bankruptcy petition.<sup>173</sup> Instead of reaching this question, though, *Colon* implicitly accepted the inapplicability of § 523(a)(16) to its own facts under § 1328(a) as evidence that the assessments *were* a claim.<sup>174</sup> This meant that the only question was when that claim arose.<sup>175</sup> Thus, the court assumed the claim was substantive in nature without reaching an examination of state law and based its opinion instead on the question of “when a debt or claim arises” for purposes of determining discharge—a question governed by federal law.<sup>176</sup>

Notably, this court “share[d] the concerns voiced by the court in *Pigg*” that a homeowner no longer holding any interest of benefit to him could be left to shoulder the burden of assessments attached to an abandoned home.<sup>177</sup> *Colon* therefore rendered the HOA debts to be dischargeable in accordance to the plan on the theory that the obligation arose out of a prepetition contract.<sup>178</sup> This ruling, the court said, prevents a conclusion that is “in contrast to the plain language of § 1328(a).”<sup>179</sup> Thus, the court found the HOA could not “pursue

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<sup>172</sup> *Id.*

<sup>173</sup> *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010).

<sup>174</sup> *See Colon*, 465 B.R. at 662–63.

<sup>175</sup> *Id.* at 663.

<sup>176</sup> *Id.* (quoting *In re Turner*, 101 B.R. 751 (Bankr. D. Utah 1989)).

<sup>177</sup> *Id.* at 661 n.20.

<sup>178</sup> *Id.* at 661–62. Although *Colon* never referred to prepetition contracts, its discussion adopted *Turner* in noting that the obligations were claims “despite the fact that at the time of the plan’s confirmation they are not yet ‘fixed’ or ‘matured’ and remain ‘contingent.’” *Id.* at 661 (quoting *Turner*, 101 B.R. at 751). Thus, *Colon* also implicitly adopted the prepetition contract portion of *Turner*.

<sup>179</sup> *Id.* at 663.

the [d]ebtors for collection of [HOA] assessments and the stay should not be modified to allow the same.”<sup>180</sup>

*Colon* could have been consistent with *Foster* if the court had first found that the debt arose from a running covenant, and that by abandoning the property, the debtors effectively ceased to hold the necessary interest to trigger continued liability.<sup>181</sup> However, this reading would have made *Colon* incompatible with *Spencer*, which found a continued obligation in spite of abandonment.<sup>182</sup> In any event, the textualist reading in this case is the stronger interpretation because of the convergence of the *expressio unius* canon and the judicial preference not to render any statutory provisions superfluous or meaningless.<sup>183</sup> While generally “[t]here are reasons to be skeptical” of this second canon,<sup>184</sup> a purposivist reading of this particular statute renders not just one term in a list unnecessary, but an entire provision. The most problematic argument in *Foster* was the dismissal of Congress’s decision not to include cases brought under § 1328(a) in the § 523(a) exceptions from discharge:

We recognize that the discharge provision under chapter 13 is broader than that in chapter 7. However, we doubt the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under chapter 13 to stay in his or her property after the order for relief . . . Whether the omission of § 1328(a) in § 523(a)(16) or vice versa is a statutory misstep is a question we need not answer. Suffice to say, on the facts before us, there is no statutory default rule regarding an exception to discharge for postpetition HOA dues.<sup>185</sup>

In fact, the original amendment to the Code that introduced § 523(a)(16) was intended to cure the lack of a default rule.<sup>186</sup> Still, a court should not so easily dismiss the omission of § 1328(a) from the amendment simply to allow it to treat all cases identically, regardless of which section was used to effect discharge. If Congress intended to prevent discharge of postpetition assessments in all cases, it could have done so by including it in the

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<sup>180</sup> *Id.*

<sup>181</sup> See *supra* notes 134–41 and accompanying text.

<sup>182</sup> See *supra* notes 151–52 and accompanying text.

<sup>183</sup> See MANNING & STEPHENSON, *supra* note 155, at 248.

<sup>184</sup> *Id.*

<sup>185</sup> *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010).

<sup>186</sup> See *Liberty Cmty. Mgmt. v. Hall (In re Hall)*, 454 B.R. 230, 238 (Bankr. N.D. Ga. 2011) (explaining Congress’s intent in creating § 523(a)(16)).

enumerated sections to which § 523(a) applies. In fact, it could simply have said that the § 523(a)(16) amendment applies to all sections of the Code. As the Code is written, the canons of construction discussed should be used to guide the understanding that the inapplicability of the Code to § 1328(a) was not accidental, but required instead an intentionally different outcome than cases to which the exception applied.

In light of the overall intent of Congress in passing the amendment,<sup>187</sup> and the fact that “the discharge provision under chapter 13 is broader than that in chapter 7,”<sup>188</sup> the decision by Congress not to include every possible bankruptcy case should not be overlooked. It is odd that an amendment explicitly seeking to expand the exceptions to discharge<sup>189</sup> would omit from its language such an important subset of bankruptcy cases, but that does not enable courts to assume there was no reason for the omission.<sup>190</sup>

Even so, *Foster* and *Spencer* are not the only courts to reach such a conclusion. An additional court, in *Liberty Community Management, Inc. v. Hall (In re Hall)*, addressed this argument explicitly and determined that “the addition of [§] 523(a)(16) does not necessarily pre-suppose that [postpetition] assessments are claims.”<sup>191</sup> It continued: “There is no legislative history indicating that [postpetition] assessments are ‘claims.’ It is just as likely that Congress was implying that [postpetition] assessments are not really claims at all, and that the amendment was necessary to correct the mischaracterization of [postpetition] assessments as claims.”<sup>192</sup> Finally, according to the court, the stated purpose of adding § 523(a)(16) was to cure a split of authority as to whether association fees were dischargeable.<sup>193</sup>

The court also asserted that Congress intended to increase protection to HOAs: “Congress expressly intended to prevent such fees from being discharged to the detriment of associations.”<sup>194</sup> This argument seems to have an answer to the *expressio unius* canon, but it nevertheless fails to explain why Congress would use a § 523(a) exception to resolve confusion as to the

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<sup>187</sup> 4 COLLIER ON BANKRUPTCY ¶ 523.LH (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2011) (noting that aside from a technical exception, “every other 2005 amendment to [§] 523(a) was designed to expand the scope of the subject discharge exception”).

<sup>188</sup> *Foster*, 435 B.R. at 659.

<sup>189</sup> 4 COLLIER, *supra* note 187.

<sup>190</sup> See *Director v. Palmer Coking Coal Co.*, 867 F.2d 552, 556 (9th Cir. 1989).

<sup>191</sup> *Hall*, 454 B.R. at 237.

<sup>192</sup> *Id.* at 238.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

definition of a claim. The more likely conclusion is that Congress had a reason not to take the strongest possible step toward excepting postpetition assessments in absolutely all cases. Whether it was due to a congressional misstep<sup>195</sup> or came about as a result of a compromise in drafting the bill<sup>196</sup> is of little import; in either case, it is Congress's job, and not the courts', to ensure that the law says what it was intended to say.

In light of these two canons of construction, it logically follows that only either *Colon* or *Foster* can adhere to the plain reading of the statute, although they both claim to do so. In fact, having decided that § 523(a)(16) did not apply to their cases, they effectively reverted to the same precedent that resulted in the amendment in the first place.<sup>197</sup> Because it led to the equitable conclusion that a homeowner continuing to reside at a property should continue to pay, *Foster* relied on *Rosenfeld*.<sup>198</sup> *Colon*, in turn, distinguished *Foster* according to the type of interest the debtor held over the property, implicitly following the *In re Ryan* line of reasoning.<sup>199</sup> *Colon* also relied on the *Turner* rule, which instructs that HOA dues are "claims" as meant by the bankruptcy court.<sup>200</sup> Further complicating *Colon*'s relationship to *Foster*, the part of *Turner* quoted in *Colon*'s reasoning states that "'federal bankruptcy law, not state law, governs when a debt or claim arises for purposes of determining whether or not a debt is discharged.'"<sup>201</sup>

When a § 1328(a) debtor has surrendered the property and a bank is unwilling to complete foreclosure, the plain language of the Code actually leads to the equitable conclusion that postpetition assessments are dischargeable because they are claims that arose out of a prepetition agreement and are not excepted by any other Code provisions.<sup>202</sup> Cases that reach a different conclusion do so because "the determination of property rights and

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<sup>195</sup> See *Foster v. Double R Ranch Ass'n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010).

<sup>196</sup> See generally John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 *FORDHAM L. REV.* 2009, 2010 (2006) ("The design of the legislative process emphasizes the need for compromise, and compromises are often complex, awkward, and even incoherent—thus making it dangerous for judges to smooth over the details of an agreed-upon text to make it more coherent with its perceived purpose").

<sup>197</sup> See *supra* Part II.A.

<sup>198</sup> *Foster*, 435 B.R. at 660 ("[T]he holding in *Rosenfeld* is persuasive").

<sup>199</sup> Ricotta, *supra* note 4, at 194. ("The Ryan line took a compromise position, which posited that postpetition assessments were dischargeable unless the debtor resided in or leased the unit."); see also *In re Ryan*, 100 B.R. 411 (Bankr. N.D. Ill. 1989).

<sup>200</sup> *In re Colon*, 465 B.R. 657, 661–62 (Bankr. D. Utah 2011) (citing *In re Turner*, 101 B.R. 751, 754 (Bankr. D. Utah 1989)).

<sup>201</sup> *Id.* at 551 (citing *Turner*, 101 B.R. at 754).

<sup>202</sup> *Id.* at 661–63.

enforceable obligations is left to state law,” but even these cases acknowledge this to be true only when the Code does not speak to the question.<sup>203</sup> *Turner* determined that the Code is instructive on this issue.<sup>204</sup> This is among the outcomes that should be made uniform in a subsequent amendment to the Code because the *Colon* outcome is the truly equitable one. Still, despite the clear windfall to a debtor under the Code if the *Foster* decision is an inaccurate interpretation, the analysis in *Colon* is more appropriate, because it is consistent with the plain language of the Code.<sup>205</sup>

### C. Suggested Statutory Amendments to Resolve Inequities and Inconsistencies

As a stopgap, the *Pigg*, *Foster*, and *Colon* decisions reached equitable conclusions, but they did so at the expense of the disciplined operation of their judicial duties. *Foster*'s holding was at least supported by pre-amendment case law<sup>206</sup> and stayed in line with Congress's overall intentions in passing the amendment. However, *Foster* ignored the implied meaning of Congress's omission of § 1328(a) from cases affected by § 523(a)(16).<sup>207</sup> Courts have confounded the implied definition of a “claim” and disagreed on whether federal or state law governs the timing and substance of claims. This demonstrates how important it is for Congress to revisit the Code. A more satisfactory draft would extend the exception to all § 1328 bankruptcy cases,<sup>208</sup> but would also eliminate the necessity for decisions like *Pigg* by eliminating inequitable statutory outcomes.<sup>209</sup>

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<sup>203</sup> *Maple Forest Condo. Ass'n v. Spencer (In re Spencer)*, 457 B.R. 601, 609 (E.D. Mich. 2011).

<sup>204</sup> *Turner*, 101 B.R. at 754 (“[F]ederal bankruptcy law, not state law, governs when a debt or claim arises for purposes of determining whether or not a debt is discharged in a [c]hapter 7 case.”).

<sup>205</sup> *Colon*, 465 B.R. at 661–63.

<sup>206</sup> *See River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 838 (4th Cir. 1994) (holding that when HOA fees are a product of a covenant running with the land, HOA fees are an incidence of ownership and a prepetition contract, rendering the fees nondischargeable). It is important to note that the amendment was in direct response to, but did not adopt precisely, the view of the *Rosenfeld* court. Thus, although the amendment unquestionably does not apply to *Foster*, this should have been a consideration in applying the *Rosenfeld* rule to a post-amendment chapter 13 case.

<sup>207</sup> 4 COLLIER, *supra* note 187, ¶ 523.LH[b][iv] (noting that aside from a technical exception, “every other 2005 amendment to [§] 523(a) was designed to expand the scope of the subject discharge exception”).

<sup>208</sup> More, specifically, cases discharged under § 1328(a), such as *Foster*.

<sup>209</sup> *See Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728, 736 (Bankr. M.D. Tenn. 2011) (basing their decision on the idea that “equity demands that the court fashion a remedy that balances rights of the lienholders and the right of a debtor to a fresh start”).

1. *Define “Legal, Equitable, or Possessory” Interest More Narrowly, Thereby Relieving the Debtor of Liability Once the Bank Has Seized the Property*

One way to eliminate the inequities in such cases is to return to the pre-2005 rule, at least for debtors whose homes have been seized by creditors, as in *Pigg*. This would help the debtor achieve a fresh start and would protect the creditor’s claims, but such a rule would come at the expense of the interests of the HOA and would effectively enable application of the *Colon* solution to chapter 7 cases. However, to cure the inequity to the debtor in this way, Congress must be willing to rescind some of the protection it provided, explicitly and intentionally, through the amendments in the first place. Still, this minor change would eliminate the uneasiness courts have repeatedly felt regarding the imposition of postpetition assessments on debtors who have no way of divesting themselves of the property.

A related alternative would be to actually shift the liability for such fees to the creditor as of the date of bankruptcy petition, rather than as of foreclosure. This would effectively define this postbankruptcy obligation as a risk of lending, but because it would be limited to those circumstances where the creditor has actually taken steps to reclaim the property, the institution of such obligations would be entirely within the creditor’s control.

This alternative would solve the very narrow problem addressed by the *Pigg* opinion, wherein the creditor took actual possession of the property, but would not remedy the injustice suffered by debtors who have attempted to vacate without the ability to force any action at all by a creditor. Thus, a stronger alternative may still be necessary.

2. *Legislatively Adopt the Pigg Remedy*

The remedy constructed by *Pigg* is a fairly ingenious one, and if enacted by statute, it would balance all the competing interests in a fair and thoughtful way. *Pigg* essentially forced the sale of the property as would be done in a case involving an unsecured or oversecured property, and distributed the proceeds according to the priority established by the secured status of each creditor.<sup>210</sup> Statutorily imposing on a creditor a choice between commencing foreclosure or selling the property would enable the court to avoid extinguishing the

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<sup>210</sup> *Id.* at 735–36.

creditor's rights while ensuring the debtor's fresh start.<sup>211</sup> If the creditor prefers to retain the property in hopes that its value will increase, as is suggested by some courts as the impetus behind the trend towards slow or stalled foreclosure actions in the wake of the housing market crisis, the creditor can take on the obligations that go with sitting on those rights.<sup>212</sup> If instead it chooses not to take on the immediate cost of paying the assessments themselves, the *Pigg* remedy would provide for such a creditor to be compensated while simultaneously protecting the HOA and allowing the debtor a fresh start without the burden of any recurring payments.

Even if courts are generally reluctant to transfer the obligation to an unwilling creditor, an exception should be included for situations in which the creditor has actually taken possession of the property at issue—as occurred in *Pigg*—by considering the creditor to be, by definition, in full “legal” possession for this single, limited purpose.

### 3. *Convert Claims on Homes to “Use it or Lose it” Claims*

A bankruptcy proceeding is not only focused on ensuring the debtor's fresh start, but also looks after the interests of creditors.<sup>213</sup> However, the 2005 amendment focused too much on the burden imposed on HOAs and purportedly solved that problem by placing the entire burden on the debtor, ignoring the windfall obtained by the creditor and forcing courts to significantly harm debtors' fresh starts.<sup>214</sup> Creditors should not be able to bide their time and wait for the market to improve their investment while passing off the costs of such investment to an unwilling debtor, as the Code currently allows.<sup>215</sup>

If creditors want to enjoy the benefits of an improved market, they should also bear the cost of not acting immediately.<sup>216</sup> The windfall given to creditors through this legislation is not mentioned in the case law, but should be considered in the balancing of competing interests. Congress's actions were

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<sup>211</sup> *Id.*

<sup>212</sup> See *Canning v. Beneficial Me., Inc. (In re Canning)*, 442 B.R. 165, 172 (Bankr. D. Me. 2011).

<sup>213</sup> See *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*, 456 B.R. 627, 631 (Bankr. S.D. Ga. 2011) (“Debtors’ fresh start is not the only interest addressed in the [ ] Code.”).

<sup>214</sup> See H.R. REP. NO. 109-31, at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 154.

<sup>215</sup> *Canning*, 442 B.R. at 172.

<sup>216</sup> This passing off of costs was explicitly deemed acceptable in *Canning* when the court noted that part of the decision whether to foreclose is based on expectations of the real estate market and the fact that real estate may appreciate. *Id.* (“The Cannings’ demand [that the creditors] ‘foreclose or release, now’ ignores the prospect that real estate values change.”).

stated as being intended to support HOAs suffering from lack of funds as a result of members' bankruptcies,<sup>217</sup> but bankruptcy as a whole is intended to protect debtors.<sup>218</sup> Indeed, bankruptcy as an institution reflects a policy decision that emphasizes, at least in some cases, the debtor's interests must come before the creditors'.

That Congress has chosen to put HOAs in a specially protected class is not for the courts to review, even if the choice was made under the influence of special interest groups, as suggested with disapproval by *Pigg*.<sup>219</sup> However, Congress made no mention of general lenders in its reports,<sup>220</sup> and it stands to reason that one way to solve the inequity would be to pass additional legislation explicitly leaving liability with the creditor in situations such as those at issue in *Pigg*. Since a secured claim is supposed to be supported entirely by the collateral, it could be argued that the costs of maintaining the property are simply part of the initial lending contract. This would place the burden on the party with the ability to control the timeline of the proceedings, preventing debtors from being stuck in a "quagmire" while awaiting action by the creditor.<sup>221</sup>

Such a development would undoubtedly lead to a change in the lending market. The precise reaction on the part of creditors is beyond the scope of this Comment, but would be worthy of further examination in the future. That said, it can be assumed that costs for all borrowers would increase, in the form of interest rates or other measures instituted by lenders to protect themselves. Still, this is not necessarily an unfavorable outcome. For one thing, although circumstances like that in *Pigg*, *Colon*, and *Spencer* have become more frequent in recent years,<sup>222</sup> there is no indication that the majority of creditors refuse to foreclose. Thus, the actual change in cost is likely to be relatively slight. In addition, it could represent a policy decision on par with vicarious

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<sup>217</sup> H.R. REP. NO. 109-31, at 88.

<sup>218</sup> See Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2006) ("The principal theory of consumer bankruptcy in America is that it provides a 'fresh start' for debtors." (citing Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047, 1059 (1987))).

<sup>219</sup> *Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg)*, 453 B.R. 728, 735–36 (Bankr. M.D. Tenn. 2011). The suggestion that the influence of special interest groups in lawmaking can be used as support for judicial action to overrule a facially unambiguous statutory provision is particularly troubling. By questioning the system itself, this is perhaps the most egregious evidence of judicial overreach in this opinion.

<sup>220</sup> See H.R. REP. NO. 109-31, at 88.

<sup>221</sup> *In re Colon*, 465 B.R. 657, 663 (Bankr. D. Utah 2011).

<sup>222</sup> *Pigg*, 453 B.R. at 733–34 (explaining how the economic landscape has changed in recent years due to the collapse of the real estate market, and lenders are refusing to foreclose as a result of it).

liability rules to shift the liability to creditors who are in the best position to protect their investments through insurance or cost-spreading.<sup>223</sup>

4. *Include § 1328(a) in the Types of Cases Within Which HOA Dues Are Excepted for Postpetition Claims when the Debtor Retains the Property*

Legislative intent to broaden protection for HOAs is hardly indecipherable, as this section of the Code has been amended twice.<sup>224</sup> The second of these amendments was explicitly meant for the protection of associations and community organizations.<sup>225</sup> Thus, it seems odd that an amendment explicitly seeking to expand the scope of the exceptions to discharge<sup>226</sup> would itself except from its language such an important class of bankruptcy cases. Many courts have made this argument in reaching a conclusion that would be consistent with a plain reading of the statute if § 523(a)(16) had been explicitly adopted for § 1328(a) cases.<sup>227</sup> But it ignores the fact that Congress had the opportunity to act in this way and chose not to do so.

The appropriate congressional reaction to this particular ambiguity, therefore, depends upon whether the omission of § 1328(a) from the § 523(a)(16) exception was a “statutory misstep,”<sup>228</sup> or the result of a legislative compromise.<sup>229</sup> If Congress truly wanted the statute read so as to put the interests of the HOA above all other related interests in a bankruptcy proceeding, a new amendment should simply expand the coverage of § 523(a)(16) to also cover § 1328(a) discharges. This cures the *Foster* problem, but would draw *Colon* back within the plain language and cause an inequitable problem similar to that faced by the court in *Pigg*. Therefore this solution, while certainly the simplest, must be accompanied by one of the solutions to

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<sup>223</sup> See *First Nat. Bank of Louisville v. Lustig*, 727 F. Supp. 276, 280 (E.D. La. 1989) (“The modern economic and legal rationale for [respondeat superior] is that an employer is in a better position to internalize and absorb the costs of the liabilities incurred by his employees as a cost of doing business; or to insure against such liabilities, and to shift these costs to the public.”).

<sup>224</sup> Ariane Holtschlag, *Assessing § 523(a)(16)*, AM. BANKR. INST. J., June 2012, at 17 (noting that the second amendment adding the “legal, equitable or possessory” clause is an “odd reversal of course for Congress”).

<sup>225</sup> H.R. REP. NO. 109-31, at 88.

<sup>226</sup> 4 COLLIER, *supra* note 187, ¶ 523.LH[b][iv].

<sup>227</sup> See *Foster v. Double R Ranch Ass’n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010) (doubting that there is legislative intent behind the “omission of § 1328(a) in § 523(a)(16) or vice versa”); *Maple Forest Condo. Ass’n v. Spencer (In re Spencer)*, 457 B.R. 601 (E.D. Mich. 2011) (noting that courts adopt a narrow version of § 523(a)(16) when deciding cases that fall outside the statutory language according to one of three lines of cases developed before the enactment of § 523(a)(16)).

<sup>228</sup> *Foster*, 435 B.R. at 659.

<sup>229</sup> MANNING & STEPHENSON, *supra* note 155, at 224.

the larger inequity listed above, unless Congress is truly comfortable with placing such a large burden on bankrupt homeowners.

### CONCLUSION

In summary, the Code leaves a court with an instruction that leads to unfair results in three of the six possible types of discharge to which it applies. While it is intuitive that a debtor should continue to pay assessments while in possession of the property, this actually only seems to occur, absent creative argument on the parts of the courts deciding the cases, in §§ 727 and 1328(b) cases. In a § 1328(a) case, the plain language pushes away from the exception that should be applied, giving the homeowner the benefit of both a discharge and continued enjoyment of the HOA's services. By contrast, when the debtor surrenders the property, only when discharge is granted under § 1328(a) does the intuitive result follow from the statute and grant discharge of HOA fees; under both §§ 727 and 1328(b) a debtor could theoretically be left paying unending fees on a property on behalf of a creditor that refuses to foreclose. The table below, reprinted from the Introduction and updated with the case names that correspond to each scenario, summarizes these outcomes.<sup>230</sup> As the table shows, courts have had to accept unjust outcomes or argue around the Code in *half* of the scenarios; when a statute so often fails to conform to an intuitive view of justice, it seems logical that the statute must be revisited.

|                              | Property Retained                | Property Surrendered                    |
|------------------------------|----------------------------------|---|
| § 727 – Intuitive Result     | No discharge                     | Discharge                               |
| Actual Result                | No discharge – √                 | No discharge – X – <i>Pigg</i>          |
| § 1328(a) – Intuitive Result | No discharge                     | Discharge                               |
| Actual Result                | Discharge – X –<br><i>Foster</i> | Discharge – √ –<br><i>Spencer/Colon</i> |
| § 1328(b) – Intuitive Result | No discharge                     | Discharge                               |
| Actual Result                | No discharge – √                 | No discharge – X                        |

The court in *Pigg* reached what seems clearly to be a more equitable conclusion than the statute's plain language would allow. It did so, however, via an impermissible act of judicial activism when it could have focused on the most important fact distinguishing it from nearly all other cases in this area: the

<sup>230</sup> For each section, the shaded box represents what seems to be the fair outcome and the one sought by courts in the cases discussed throughout this Comment. On the other hand, the bottom row corresponds to the result of interpreting the plain language.

creditor was in control of the property.<sup>231</sup> While this would still have contradicted the plain language, it would have done so in a way that more definitely explained *why* the legislature was unlikely to have considered the scenario at issue in this case and kept the court within the boundaries of its traditional role in the political realm.

In *Foster* as well, the court was forced to go out of its way to work around, rather than through, the statutory language to reach what should be an obvious result. This is starkly shown by the *Colon* opinion, which interpreted the plain language differently and more strictly. The two are irreconcilable because there is no principled way to differentiate between a homeowner who has only legal title to a property and one who still retains actual possession in light of Congress's enactment of § 523(a)(16), which implicitly defined HOA fees as claims in bankruptcy. The omission of § 1328(a) from § 523(a) cannot be so easily ignored. Postpetition dues are excepted from discharge, and the court's usual preference not to make statutory language superfluous requires that they therefore be considered otherwise dischargeable claims. *Foster* found otherwise only because it was necessary to prevent the debtor, who was living in a home and benefiting from HOA membership, from discharging his obligation to pay the HOA fees.

*Colon* stayed within a textualist reading of the Code, but was also forced to try reconciling the irreconcilable; its holding is simply not one that can be compatible simultaneously with both *Foster* and *Spencer*. In fact, *Spencer* had the opportunity to reach the same fair conclusion found in *Colon*, but confusion over the legislative definition of claim led instead to its following *Foster*, furthering the unjust situation the court in *Pigg* worked so hard to overcome.

Thus, it is necessary to revisit the statute a third time to protect HOAs and debtors from bearing the risks accepted by creditors at the time loans are distributed while simultaneously ensuring that a plain reading does not promote a windfall for the chapter 13 debtor. It is possible that even the outcome in *Pigg* was contemplated by Congress in the passage of the 2005 amendment. If so, Congress should simply act to overrule the judicial action in that case. Otherwise, one or more of the changes suggested above would operate to retain, as much as possible, the balance struck by those amendments

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<sup>231</sup> *Pigg v. BAC Home Loans Servicing (In re Pigg)*, 453 B.R. 728, 731, 733 (Bankr. M.D. Tenn. 2011).

while at the same time protecting the chapter 7 debtor who has vacated and surrendered her property.

Such an amendment should also explain the legislative intent in omitting § 1328(a) from the list of discharges from which postpetition assessments are excepted. If indeed this was an intentional move by Congress, then an amended statute could add to the legislative history, ideally with an explanation for why there should be a difference between a § 1328(a) discharge and a consumer discharge under any other chapter. If it was merely an accidental oversight, the amendment would solve this too, by extending the application of § 523(a)(16) either with a general provision within § 523(a) or by adding that section to the list of exceptions contained within § 1328(a)(2).

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