FITTING THE ROUND PEG INTO THE SQUARE HOLE: CONDOMINIUM ASSESSMENTS IN CHAPTER 13 BANKRUPTCY

by *Steve Sowell**

Condominium liens are neither a mortgage nor an executory contract, although bankruptcy courts have treated them as both.[1] The truth is that condominium liens have the attributes of both, as well as other attributes not easily categorized under the United States Bankruptcy Code ("the Code").[2] For instance, condominium liens can be foreclosed in the same manner as mortgages if not paid.[3] Also, ownership of a condominium imposes on both the condominium association and the co-owner[4] continuing ("executory") obligations regarding maintenance and repair of the unit and the common elements and compliance with the bylaws, rules, and regulations of the project.

Condominiums were not treated at all in the Code until the Bankruptcy Reform Act of 1994,[5] and because this amendment did not address Chapter 13[6] cases, courts, trustees, debtors, and condominium associations continue to struggle with how to treat condominium assessments in the context of a Chapter 13 bankruptcy case. This article presents a paradigm for treatment of condominium assessments in a Chapter 13 case. The appendix to the article is a proposed Proof of Claim on behalf of a condominium association in a Chapter 13 case.[7]

The Nature of a Condominium and its Lien for Assessments

Condominiums are creatures of statute; condominiums did not exist at common law. A parcel of real property is established as a condominium by the recording of a Master Deed.[8] The affairs of the condominium project are usually governed by a nonprofit corporation ("the association") organized for that purpose.[9] Once established, each condominium unit, together with and inseparable from its assigned share of the common elements, is "subject to ownership,

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mortgaging, taxation, possession, sale, and all types of juridical acts, *inter vivos* or *causa mortis*" independent of the other condominium units in the project.[10]

The enabling statute for condominium liens is MCLA §559.208(1); it provides that "sums assessed to a co-owner by the association of co-owners which are unpaid constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment." Assessments typically consist of the unit's proportionate share of the monthly operating expenses of the project and additions to the reserves of the association (the "general" assessment), although additional and special[11] assessments for large repairs or additions to the project are not uncommon.[12] The typical assessment is payable on a monthly basis, usually on the first of the month.[13] Additional and special assessments are payable at such times as the board of directors may direct, or as may be provided in the condominium bylaws.

The due dates for assessments can be confusing. Although the general assessment is levied on a monthly basis, some condominium documents provide for the general assessment to be an annual assessment payable in monthly installments, with provision for acceleration of the balance of the annual assessment upon default.[14] Additional and special assessments are generally due when the Board of Directors, the condominium documents, or the authorizing resolution adopted by the co-owners provides. It is not uncommon for additional and special assessments also to be payable in installments, with or without acceleration.

Claims Under the Bankruptcy Code

Unpaid condominium assessments constitute a claim under the Code.[15] The Code differentiates between secured and unsecured claims: a claim is a secured claim only to the extent that there is identifiable collateral of a sufficient value to pay the full amount of the debt.[16] For a condominium lien, the collateral is the condominium unit or units[17] subject to the lien. If the value of the collateral is less than the amount of the debt, the debt is bifurcated under the Code into a secured claim to the amount of the value of the collateral and an unsecured claim for the excess debt over value. If there is no value in the collateral to which the debt can attach, the claim is completely unsecured.

By statute, a condominium lien is junior to tax liens in favor of any state or federal taxing authority and to sums unpaid on a first mortgage recorded prior to the recording of the Notice of Lien.[18] Depending upon the balance due on senior liens, it is possible that a condominium lien will be partially or completely unsecured. Since Chapter 13 plans can provide for minimal payments on unsecured claims,[19] being completely unsecured may mean that the condominium association receives only a few cents on the dollar.

Valuation of the Condominium Unit

If the condominium lien can be completely unsecured, then valuing the condominium unit and establishing the balance due on superior claims is extremely important to the condominium association. The court will determine the value of a claim secured by a lien on property on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity the court may direct.[20] The value is to be determined in light of the purpose of valuation and of any proposed disposition or use of the property and in conjunction with a hearing on a plan affecting the creditor's interest.[21] By local rule in the Eastern District of Michigan, a Chapter 13 plan must state the value of each item of encumbered property.[22] A creditor who objects to the valuation assigned in the plan may file objections to the valuation, either as an objection to confirmation or in its proof of claim, in which case the valuation must be decided prior to confirmation of the plan.[23]

A valuation hearing may take place as a part of the confirmation hearing, although it may be necessary to schedule a separate evidentiary hearing due to time considerations. The association's attorney should obtain an appraisal of the unit, and should have the appraiser present to testify at the hearing if valuation cannot be resolved with the debtor prior to the hearing. The association's attorney will also need to subpoena the records of any senior lien creditors to find out their balance due, if there is a dispute with the debtor as to the amounts due on these prior claims. At a minimum, the bankruptcy court's claims file should be reviewed to determine the amounts for which these prior creditors have filed proofs of claim.

Components of the Condominium Association's Proof of Claim

As evidence of their claim, creditors file a proof of claim.[24] A claim for which a proof of claim has been filed is automatically allowed unless a party in interest objects to it.[25] If an objection is made, the court shall, after notice and hearing, determine the amount of the claim in US dollars as of the date of the filing of the petition.[26]

The condominium association's proof of claim consists foremost of condominium assessments. The proof of claim should list the months and dollar amounts of the assessments which fell due prior to the filing of the case. While an itemization is not specifically required by the Code, listing the months and dollar amounts of the general (and the special and additional assessments, if any) helps all parties understand the details of the claim, serves to reduce objections to claims, and helps the trustee set up the claim properly for payment. Most condominium bylaws also provide for the recovery of interest[27] on unpaid assessments as well as late charges, and the proof of claim should state the rate and amount of interest and the late charge rate.[28]

The Michigan Condominium Act and most condominium documents provide that "[i]n a proceeding arising because of an alleged default by a co-owner, the association of co-owners, if successful, may recover the costs of the proceeding and such reasonable attorney fees as may be determined by the court."[29] If the condominium lien was in foreclosure at the time of filing of the bankruptcy case, the proof of claim should itemize the attorney fees and costs incurred in the foreclosure proceedings. Since a bankruptcy proceeding is also a "proceeding arising out of a default by a co-owner," the proof of claim should include fees for the filing of the proof of claim.[30] Note that the Code provides that a lienholder is entitled to recover any reasonable fees, costs, or charges provided for under the agreement under which such claim arose only if there is excess value over and above the amount of the lien.[31] Again, valuation is important; if there is not sufficient equity in the condominium unit, costs and fees incurred subsequent to the filing of the case need not be paid. While the statute speaks in terms of the "agreement under which such claim arose," the Supreme Court has held that holders of non-consensual liens are entitled to recover interest.[32]

The association's proof of claim should also state the current amount of monthly assessments and the next due date from the date of filing, so that the trustee can set up his records for payment of the future assessments. At least, setting forth the future rate of assessments puts the debtor, his attorney, and the trustee on notice that there *are* future assessments that must be taken into consideration at some point in the debtor's plan.

Treatment of the Condominium Association's Claim

The debtor is required to file a plan not later than 15 days after the filing of his case, unless the time is extended by the court for cause upon a motion filed within the 15 days.[33] The plan sets forth the treatment of claims. The Code provides the debtor several options for treatment of claims, depending upon the type of claim and its status at the time of filing.

If the association had not recorded a lien prior to the filing of the case,[34] the debtor may classify the association as an unsecured creditor, which will be paid some percentage of its claim. This percentage may be between 100% plus interest[35] down to 10% or less,[36] depending upon a variety of factors, including the debtor's income and the amount and type of his other debts. Obviously, it is to the association's benefit to record a lien prior to the filing of a case.[37]

Assuming that a notice of lien was recorded prior to filing, a Chapter 13 plan may provide for the curing of any arrears due on a claim on which the last payment is due after the scheduled completion of the plan over a reasonable[38] period of time and maintenance of the current monthly payment during the life of the plan. 11 USC §1322(b)(5). It is questionable whether this provision applies to condominium assessments, since assessments theoretically do not exist until they have been levied, and thus there are no continuing monthly payments to be maintained On the other hand, condominium assessments can reasonably be expected to be levied as long as the condominium exists, so it is reasonable to argue that condominium assessments should be treated under this section of the Code.[39]

If a notice of lien was filed and the debtor does not elect to treat the claim in accordance with 11 USC §1322(b)(5), 11 USC §1322(c)(2) provides that the claim may be modified. If the association is only partially secured and the condominium unit is not the debtor's principal residence,[40] the debtor may attempt to "cram down" the association's debt to the debtor's equity in the property remaining after prior liens, and pay that amount over the life of the plan.[41] However, if the claim is modified in this fashion, arguably any assessments levied post-petition would be a post-petition debt not subject to the Chapter 13 plan.[42] If the debtor attempts to modify the association's debt in this fashion the debtor will still have to provide in the plan for payment of future assessments as they fall due, or the debtor will quickly face a post-petition default.

Another possibility is that post-petition condominium assessments are administrative expenses. 11 USC §503(b)(1)(A) provides that there shall be allowed administrative expenses, including "the actual,

necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Certainly condominium assessments, which are the co-owner's share of the common expenses of administration of the project, are incurred for preserving the condominium unit, which became property of the estate upon filing.[43] Since the budget on which the assessments are based is a projection for the coming year, the assessments may not be "actual" costs and expenses within the meaning of this section.[44]

Administrative expenses must be paid in full in the course of a case, but the Code does not specify *when* they must be paid. The debtor could provide for payment of all post-petition assessments at the end of the plan. The association's objection to this treatment is that doing so does not provide the association with adequate protection, since it continues to incur the expenses even while they are not being paid.

Finally, the debtor may provide for direct payment of condominium assessments. This seems allowable as long as the debtor is current on assessments at the time of filing and remains so up until confirmation.[45]

Special Protection for "Principal Residence Security Interests"

Section 1322(b)(2) of the Code provides that a Chapter 13 plan may modify the rights of holders of secured claims, "other than a claim secured only by a security interest[46] in real property that is the debtor's principal residence."[47] Prior to 1993, some courts had held that it was possible for a plan to "strip" a partially secured security interest down to the fair market value of the property, paying the balance as an unsecured debt; however, the Supreme Court held in **Nobelman v American Savings Bank**[48] that such lien stripping modified the right of a partially secured mortgagee to receive payments in the amount and at the times specified in the mortgage and thus ran afoul of this anti-modification provision. Thus, as long as a condominium lien is at least partially secured by value in the condominium unit, the condominium association's claim must be paid in full.

However, the protection is not absolute. By its own terms, the Code section applies only to security interests in the debtor's principal residence; it does not apply to second homes, a common use for condominiums, especially in resort areas. It does not apply if the security interest covers more than just the residence; since the lien covers all units owned by the co-owner, this protection probably does not apply to a condominium lien against a co-owner who holds more than one unit in the project. Finally, if there is no equity at all to which the condominium lien can attach because of the balance due on the first mortgage and/or tax liens, at least one court has held, despite **Nobelman**, that the security interest is not "secured" by the debtor's principal residence and the debt can be paid as an unsecured claim.[49]

As with most things in life, timing in the filing of a bankruptcy case is everything. If the co-owner wishes to pay the arrears owed to the association over the life of the plan, the co-owner must file his case prior to a foreclosure sale of the condominium unit.[50] Once the sale has been held, the co-owner may only redeem the unit within the redemption period provided by law.[51]

Objection to Confirmation of the Plan

If the association believes that the debtor is not treating its claim properly in accordance with the Code, the association may file objections to confirmation.[52] The association may also object to confirmation of the case if the association believes that the case has been filed in bad faith.[53] The objection must be served on the debtor, the debtor's attorney, the Chapter 13 trustee, and the United States Trustee.[54] The court will hold a hearing on confirmation to resolve any objections.[55]

Changes in the Amount of the Assessment

The rate of the monthly assessment can reasonably be expected to change during the life of a typical three-to-five year plan, based upon changes in the association's budget. If the trustee is paying the current assessments, the association must notify the trustee of any change in the payment amount so that the trustee can make adjustments in payment accordingly.[56] It is important to notify the trustee of the payment change, so that the trustee makes the payments in the proper amount. If a payment increase occurs relatively early in the life of a plan and no notification is given, the debtor will accrue a significant deficit by the time the plan is completed. This defeats the purpose of a Chapter 13 plan, which is to cure any arrears and allow the debtor to pick up with only current obligations at the end of the plan. Although the Code provides that a debt provided for under 11 USC §1322(b)(5) is not discharged, Local Rule 13.13 for the U. S. Bankruptcy Court for the Eastern District of Michigan provides that a discharge of the debtor means that all payments on such a continuing

debt are considered current.[57] A prudent condominium attorney will advise his client in writing of the obligation to update the debtor and the trustee with payment changes to avoid the possibility of discharge of post-petition assessments.

Avoidance of the Condominium Lien

A condominium lien is perfected by recording a Notice of Lien with the Register of Deeds for the county in which the project is located.[58] The Code gives the trustee the power to avoid the fixing of a statutory lien on property of the debtor if the lien "is not perfected or enforceable at the time of commencement of the case against a *bona fide* purchaser that purchases such property at the time of commencement of the case, whether or not such a purchaser exists."[59] The Code also give the trustee the rights and powers of a *bona fide* purchaser of real property from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a *bona fide* purchaser and has perfected such transfer at the time of commencement of the case, whether or not such a purchaser exists.[60]

However, a condominium lien *is* enforceable against a *bona fide* purchaser of a unit: unless a prospective purchaser requests a statement from the association at least five days before the sale, the purchaser "shall be liable for any unpaid assessments against the condominium unit together with interest, costs, and attorney fees incurred in the collection thereof."[61] Because the lien is enforceable against *bona fide* purchasers under applicable non-bankruptcy law even if not recorded, the author would argue that the condominium lien must be treated as a secured claim even if the Notice of Lien has not been recorded as of the commencement of the case.[62]

Why is this issue important to the condominium association? Because the difference between treatment as a secured claim and as an unsecured claim may mean the difference between payment in full and receiving only a few cents on the dollar. If the association's lien can be avoided, the association is unsecured. It is unclear to what extent either the trustee or the debtor may attempt to avoid the association's lien. The duties of the Chapter 13 trustee[63] do not include the avoidance powers, and the debtor is not specifically granted the avoidance powers.[64] Possibly, they share the power jointly.[65]

Post-Petition Defaults

The sad truth is that the majority of Chapter 13 cases end in dismissal, not discharge. Upon a default by the debtor in payment subsequent to confirmation of a plan, the association will need to take prompt action to protect its interest, especially if the condominium is only partially secured. If the debtor were current on assessments at the time of filing so that no lien had been recorded pre-petition, can the association file a lien for post-petition assessments? Determining the answer to this question requires a careful review of several provisions of the Code.

The commencement of a case creates an estate, which consists generally of all legal or equitable interests in property of the debtor as of the commencement of the case. 11 USC §541(a). The automatic stay applies to acts against the debtor or property of the estate. 11 USC §362(a). The Chapter 13 plan may provide for the vesting of property of the estate, on confirmation of the plan or at a later time,[66] in the debtor or in any other entity. 11 USC §1322(b)(9). The stay of a prohibited act against property of the estate continues until the property is no longer property of the estate. 11 USC §362(c)(1). The stay of a prohibited act against the debtor continues until the case is closed, the case is dismissed, or a discharge is granted, whichever is earlier. 11 USC §362(c)(2).

The recording of a lien against the condominium unit may not be stayed post-confirmation if the debtor's plan provides that property of the estate vests in the debtor on confirmation. The service of the lien or otherwise to make a demand for payment to the debtor for solely post-petition assessments would not appear to run afoul of any of the prohibited acts against debtors under 11 USC §362(a).[67] The association should make sure that the demand letter and lien cover only post-petition assessments. Because an individual injured by a willful violation of the stay may recover actual and punitive damages, costs and attorney fees, the prudent association will seek relief from the automatic stay before pursuing collection of post-petition condominium assessments. When in doubt, seek relief from the stay first.

The more usual situation is that the debtor had defaulted prior to filing the bankruptcy case and the association was pursuing foreclosure at the time of filing. In this case, the association should seek relief from the automatic stay prior to pursuing its state court remedies, as to do otherwise would be a violation of one or more prohibited acts against the debtor.

Joe Lawyer (P12345)
Attorney for Wild Thyme Condominium Association
Address
Phone Number

PROOF OF CLAIM

1. Name of Claimant: Wild Thyme Condominium Association
   Managing Agent: Ronald Cramer & Associates, LLC
   Address: 1234 Common Element Road
   City, State, Zip Code: Southfield, MI 48075

2. The amount of the claim is $4,506.29. See schedule below for detail.

3. The basis for the claim is: Condominium lien secured by Notice of Lien pursuant to MCLA §559.208 recorded against property located at 5678 Common Element Road, Southfield, MI 48075.

4. All prior payments made on this claim have been properly credited.

5. If the claim is based on a written instrument, attach a duplicate of the instrument or explain why it cannot be attached.

   A copy of the Notice of Lien is attached as Exhibit A.

6. This Claim is not subject to any setoff or counter-claim.

7. If a security interest is claimed in property of the Debtor(s), attach a copy of the security agreement and evidence of perfection of such interest.

   A copy of the recorded Claim of Lien is attached as Exhibit A.

8. This claim is a general, unsecured claim, except to the extent that the security interest described in Paragraph 7 hereof is sufficient to satisfy the claim.

9. This is a PRIORITY SECURED CLAIM.

Dated: March 25, 1996

Joe Lawyer (P12345)

Please reference the debtor's address on all payments.

SCHEDULE OF ARREARS:

As of the filing of the debtor's petition on March 12, 1996, the past-due balance consists of:

Regular Assessments:
- February 1, 1995 to November 1, 1995 @ $120.00 per month: $1,200.00
- December 1, 1995 to March 1, 1996 @ $125.00 per month: $500.00
- Accrued partial balance for the month of December, 1994: $65.00
- **Total Regular Assessments:** $1,765.00

Special Assessments:
- Nature and purpose of assessment: Installation of playground equipment
- Due Date: January 1, 1996
- Amount: $345.00

Additional Assessments:
- Nature and Purpose of assessment: Repair of common element balconies
- Due Date: July 1, 1995
- Amount: $405.00
- **Total Special/Additional Assessments:** $750.00

Late Charges: $25.00 per month for each assessment or installment of assessment.
- **Total Late Charges:** $375.00

Interest:
- 7% per annum from the date of initial default $228.69

Costs:

Notice of Lien Recording Fee:	$9.00
Filing Fee for Complaint:	$80.00
Service Fee(s)	$105.00
Motion Fee(s)	$20.00
Judgment Fee	$20.00
Posting Fee	$30.00
Publication Fee	$198.60

Total Costs: $462.60

Pre-Petition Attorney Fees (per MCLA §559.206(b)):
- Attorney fees are itemized on the attached statement
- 5.4 hours @ $125.00 per hour $675.00
- Post-Petition attorney fees:
- Preparation of proof of claim 250.00

Total Debt Due as of filing: $4,506.29

15. 11 USC §101(5)(A).

16. 11 USC §506(a).

17. MCLA §559.208(1) and (3)(a)(I).

18. MCLA §559.208(1).

19. In the author's observations, the minimum payment permitted to unsecured creditors in a Chapter 13 plan in the Southern Division of the Eastern District of Michigan appears to be 10%. Anything less is considered to have been proposed in bad faith. The author has seen plans in the Northern Division and in the Western District confirmed at 1%, usually on the basis that *any* payment to unsecured creditors is more than they would receive in a liquidation and is therefore proposed in good faith. See 11 USC §1325(a)(3) and (b)(1)(A) and (B).

20. Rule 3012 of the Rules of Bankruptcy Procedure. Motion practice generally is governed by Rule 9013 of the Rules of Bankruptcy Procedure, LBR ED 2.08, and LBR WD 9.

21. 11 USC §506(a).

22. LBR ED 13.03(a).

23. LBR ED 13.08(c)

24. 11 USC §501(a). If a creditor fails to do so in a timely fashion, a joint obligor, the debtor or the trustee may file a proof of claim on behalf of the creditor. 11 USC §501(b) and (c).

25. 11 USC §502(a).

26. 11 USC §502(b). It is not uncommon for Chapter 13 plans in the Western District of Michigan to provide that delinquent payments shall continue to accrue up to the date of *confirmation*, and all pre-confirmation payments will be cured over the life of the plan. The author believes that this treatment probably runs afoul of this and other provisions of the bankruptcy code (see, e.g., 11 USC §1322(b)(2) and 11 USC §502), but since, if the plan is completed, the claim is paid in full anyway, the distinction may be without a difference.

27. Most condominium documents provide for 7% interest on unpaid assessments. The allowable rate of interest on arrears is the contract rate or the market rate, whichever is lower. **In re Colegrove**, 771 F2d 119 (6th Cir. 1985); **In re Cureton**, 163 BR 494 (Bankr. E.D. MI 1994). Since condominium liens are not the subject of any market of which the author is aware, the author would argue either that the document rate applies or analogize to the market rate for mortgages, but then the issue becomes whether to use 30 year mortgages, 15 year mortgages, and whether to include points, etc. There is also an excellent argument that no interest on arrears need be paid pursuant to 11 USC §1322(e) unless the condominium documents specifically provide for the payment of interest on delinquent assessments in bankruptcy. Compare to **Rake v Wade**, 113 S.Ct. 2187 (1993).

28. Due to the mathematics of the plan (the timing and amount of payments and the order of payment of claims), the date of confirmation, and the vagaries of trustee computer systems, payments to creditors are not always made "on time" even though the debtor has made his payments to the trustee timely. If the association receives a payment from the Trustee in a Chapter 13 case after the date for imposition of a late charge outside of bankruptcy, can the association impose a late charge? Anecdotal evidence would suggest no: as long as the debtor is paying the trustee timely under the plan, the fact that the trustee's payments are not disbursed timely will not be held against the debtor.

29. MCLA §559.206(b). Most condominium associations have similar, usually broader, provisions in the Condominium Bylaws.

30. Technically, any post-petition fees and costs should be approved by the court pursuant to Rule 2016 of the Rules of Bankruptcy Procedure. However, fees and costs under $500 do not require a hearing. Rule 2002(a)(7). A creditor is entitled to collect its reasonable costs and fees incurred in enforcing its rights in bankruptcy, not limited to seeking relief from the automatic stay. **In re Astronetics**, 28 BR 612 (Bankr. E.D. MI 1983).

31. 11 USC §506(b).

32. **United States v Ron Pair Enterprises, Inc.**, 489 US 235 (1989) (IRS Lien).

33. 11 USC §1321. See also Rule 3015(b) of the Rules of Bankruptcy Procedure. The Trustees for both the Southern and Northern Divisions of the Eastern District of Michigan have promulgated *pro forma* plans, which should be used in the absence of some particularly compelling reason. Copies of the plan are available by contacting the trustees' offices.

34. Also, the debtor or the trustee may attempt to avoid the lien or object to the claim of secured status in the proof of claim; see the discussion of avoidance of a lien, *infra*.

35. See **Cinco v Hardy**, 755 F2d 75 (6th Cir. 1985).

36. See footnote 18, supra.

37. See the discussion of avoidance of liens, infra.

38. The "unwritten rule" in the Eastern District of Michigan seems to be that three years is a reasonable period of time in which to cure an arrears, absent special circumstances. In the Western District, the rule seems to be that a cure within the length of the plan, however long that might be, is reasonable. The only applicable case known to the author is **In re Dockery**, 34 BR 95 (Bankr. E.D. MI 1983), which provided that a debtor is not limited to twelve months, refusing to follow a Colorado case. The

author has successfully argued for shorter cures on second and third filings.

39. The author would argue that this is the most logical treatment of the association's claim. The association is secured by a lien on the debtor's principal residence, and the claim has two components: the arrears and the continuing payments. Even if the continuing payments do not technically exist, they will spring into existence with virtual certainty in the future.

40. See the discussion of Special Protection for "Principal Residence Security Interests" infra. Debtors may try to cram down a condominium notwithstanding this special protection. Since a creditor is bound by the terms of a confirmed plan, 11 USC §1327(a), the association should timely object to confirmation if a cram down is proposed on a principal residence condominium.

41. A Chapter 13 plan may be confirmed over the objections of a secured creditor as long as it provides that the creditor retain the lien securing the claim and the value, as of the effective date of the plan, of property (i.e., payments) to be distributed under the plan on account of the claim is not less than the allowed amount of the claim. 11 USC §1325(a)(5)(B).

42. **In re Haith**, 193 BR 341 (Bankr N.D. AL 1995).

43. 11 USC §541(a)(1).

44. **In re Cheatle**, 150 BR 266 (Bankr D. CO 1993); **In re Butcher**, 108 BR 634 (Bankr. E.D. TN 1989). But see **In re Hill**, 100 BR 907 (Bankr. N.D. OH 1989).

45. The author has heard each of the judges in the Eastern District of Michigan, Southern Division, rule that a debtor who provides for direct payment of an obligation gives up the protection of the automatic stay as to that obligation. That has *not* been the author's experience in the Western District of Michigan. In either district, the author recommends seeking relief from the automatic stay, as noted later in the article. If it is the association's purpose to foreclose the condominium lien, obtaining a written order lifting the stay is usually a prerequisite to getting a title company to insure the validity of the foreclosure.

46. A security interest is a "lien created by an agreement." 11 USC §101(51). A lien is a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 USC §101(37). A security agreement is an "agreement that creates or provides for a security interest." 11 USC §101(50). Since a security interest contemplates an "agreement" and condominium liens are usually filed without the co-owner's *contemporaneous* agreement, query whether a condominium lien is a "security interest" within the ambit of 11 USC §1322(b)(2). Some condominium documents provide that, by accepting title to a unit in the project, the purchaser agrees to be bound by all of the terms, conditions and restrictions of the documents; this may be a sufficient "agreement."

47. 11 USC§1322(b)(2). The same protection is afforded in Chapter 11 cases; see 11 USC §1123(b)(5).

48. 113 S.Ct. 2106 (1993).

49. **In re Kidd**, 161 BK 769 (Bankr. E.D. NC 1993).

50. 11 USC §1322(c)(1). This has been the rule in the 6th Circuit since **In re Glenn**, 760 F2d 1428 (6th Cir. 1985); the Bankruptcy Reform Act of 1994 made the rule uniform across the circuits.

51. Or sixty days from the date of filing, whichever is later. 11 USC §108; see also **Federal Land Bank of St. Paul v Brown**, 20 BR 145 (E.D. MI 1982).

52. 11 USC §1324. In the Eastern District of Michigan, objections must be filed not later than twenty-one days after the first meeting of creditors. LBR 13.08(a) as superseded by Administrative order Number 92-03. Notices of Commencement of Case issued in the Western District generally provide that objections must be filed at least five days before the confirmation hearing.

53. **In re Caldwell**, 851 F2d 852 (6th Cir. 1988). Good faith depends on the totality of the circumstances and must be determined on a case-by-case basis.

54. Rule 3015, Rules of Bankruptcy Procedure.

55. 11 USC §1324. LBR ED 13.10 allows for confirmation of a plan without formal hearing if no objections are filed, the trustee has approved the Order Confirming Plan, and no one appears at the time set for hearing with objections.

56. The Eastern District of Michigan has a local rule specifically for mortgage payment changes due to analysis of an escrow account and/or for changes in interest rate on an adjustable rate mortgage; see LBR ED 13.04. The author suggests that this rule be used for condominium assessments. The Western District does not have an analogous rule, but some plans used in the Western District provide for payment changes, at least in mortgage payments, on notice to the debtor's attorney and the trustee.

57. Although the issue has not arisen with regard to condominium assessments to the author's knowledge, the author has seen at least one Eastern District judge advise a mortgage company, that did not analyze a debtor's escrow account during a bankruptcy, that it had to write off the deficiency that had accrued by the time of completion of the plan.

58. MCLA §559.208(3)(c).

59. 11 USC §545(2).

60. 11 USC §544(a)(3).

61. MCLA §559.211(2).

62. It could also be argued that the "or" in the statute ("not perfected or enforceable") is meant to be alternative (not perfected or not enforceable) rather than inclusive (not perfected and thus not enforceable). Since an unrecorded lien is not perfected even though enforceable against *bona fide* purchasers, it would still be avoidable under the alternative reading of the statute.

63. 11 USC §1302.

64. 11 USC §1303.

65. The standing trustee for the Southern Division of the Eastern District of Michigan rarely attempts to avoid liens, apparently believing that the debtor is in a better position to determine the validity of a lien and therefore object to it. However, trustees in the Northern Division of the Eastern District and in the Western District take a more active role in attempting to avoid liens.

66. The *pro forma* plan used in the Eastern District of Michigan, Southern Division, provides for vesting of property in the estate in the debtor. *See* Plan, Paragraph I.D. However, the pro forma plan may be modified.

67. However, if a court finds that post-petition condominium assessments are administrative expenses, the condominium association may have violated the automatic stay by attempting to collect the post-petition assessments. See **In re Hill**, footnote 404 supra.

68. 11 USC §362(a)(1).

69. 11 USC §362(d).

70. Rule 9014, Federal Rules of Bankruptcy Procedure.

71. LBR ED 2.08, 2.09; LBR WD 9, 10.

72. 11 USC §362(e).

73. E.g., mortgages, IRS liens, construction liens, state tax liens, non-filing joint owners, lessees, etc.

74. 11 USC §1301.

75. 11 USC §362(g).

76. The trustee is not specifically required to attend hearings on motions for relief from the automatic stay. 11 USC §1302(b)(2). Since Chapter 13 hearings are all scheduled at the same time in the Southern Division of the Eastern District, this is usually not a problem because the trustee is there anyway; however, that is not the case in the Western District, and the prudent association attorney may wish to confirm that the trustee will be present if a default in payment to the trustee is at issue.

77. See, e.g., LBR WD 10.