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MEMORANDUM

To: Members of the Environment and Transportation Committee

From: Maryland State Bar Association Consumer Bankruptcy Section
By: Bud Stephen Tayman, Esquire, Councilmember

Subject: House Bill 836 - Residents of Common Ownership Communities - Discharge of Liabilities in Bankruptcy Proceedings

Date: February 24, 2023

Position: Oppose

The Consumer Bankruptcy Section of the Maryland State Bar Association (MSBA) opposes House Bill 836 - Residents of Common Ownership Communities - Discharge of Liabilities in Bankruptcy Proceedings ("HB 836").

The Consumer Bankruptcy Section of the MSBA is comprised of Maryland attorneys who represent individuals, business, and certain government agencies in all aspects of bankruptcy practice. The membership consists of attorneys representing debtors, creditors, and parties in interest in bankruptcy cases under Chapters 7, 11, 12,

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and 13. The Section's governing council reviewed HB 836 and voted to submit written and oral testimony opposing the bill.

Among other provisions, HB 836 prohibits the discharge in bankruptcy proceedings of (1) any assessment, charge, fee, or fine, or (2) any lien related to any assessment, charge, fee, or fine owed to the governing body of a cooperative housing corporation, condominium, or homeowner's association (collectively referred to herein as a "Community Association" or "Community Associations"). The Consumer Bankruptcy Section's opposition is limited to the purpose and intent of HB 836 to create a class of nondischargeable debts and related liens or in any way to effect and impact which debts are nondischargeable in bankruptcy proceedings. The Consumer Bankruptcy Section takes no position on any other aspect of HB 836.

The Problem With HB 836

The bankruptcy discharge is the essence of bankruptcy law. *In re Vito*, 598 B.R. 809, 815 (Bkrtcy. D. Md. 2019)(Harner, J)(the bankruptcy discharge is the hallmark of U.S. bankruptcy law). It provides the debtor with the fresh start, *id*, promised by bankruptcy to the honest but unfortunate debtor.

The validity of a debt owed to a creditor is determined by state and federal nonbankruptcy law, *Grogan v. Garner*, 498 U.S. 279, 283-84 n. 9 (1991). That notwithstanding, however, since 1970, issues relating to which debts are, or are not, dischargeable in federal bankruptcy proceedsing are exclusively a matter of federal law. *Brown v. Felson*, 442 U.S. 127, 135-36

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(1979); *Grogan, supra at* 284. While prior to 1970, bankruptcy courts had concurrent jurisdiction with state courts to determine whether a debt was excepted from a bankruptcy discharge, the 1970 amendments to the bankruptcy code took jurisdiction over dischargeability away from the states and vested it exclusively in bankruptcy courts provided for by the bankruptcy code. *Grogan, supra* at 284 n.10; *Brown, supra* at 135-36; *see also,* S.Rep. No. 91-1173, PP. 2-3 (1970); H.R.Rep. No. 91-1502, p. 1 (1970), U.S.Code Cong. & Admin. News 1970. The bankruptcy code's statutory provisions governing dischargeability and nondischargeability reflect a Congressional decision to exclude from the general policy of discharge certain categories of debts. *Grogan, supra* at 287; see also 11 U.S.C. §§ 523(a), 727(a), 1141(d), 1192, 1228, and 1328. Debts owed to Community Associations owed or alleged to be owed as of the date the bankruptcy case is filed ("Prepetition") are debts which are dischargeable in bankruptcy proceedings. Consequently, the nondischargeability provisions of HB 836 are in direct conflict with the Congressional intent which renders Prepetition debts owed to Community Associations dischargeable in bankruptcy.

Notably, HB 836 also provides for the nondischargeability of liens which secure debts owed to Community Associations. While bankruptcy terminology generally does not refer to a lien which is no longer valid or otherwise operative as having been "discharged", unless avoided in the bankruptcy, a lien will remain *in rem* even if the underlying debt is discharged. In bankruptcy, a statutory lien in favor of a Community Association is subject to being avoided under certain circumstances, pursuant to 11 U.S.C. § 506(a), and a judgement lien in favor of a Community Association is subject to being avoided under certain circumstances, pursuant to

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11 U.S.C. §522(f)(1)(A). If the lien is avoided, the underlying debt is no longer a secured debt, but becomes a general unsecured debt. Significantly, after the bankruptcy case has concluded, the avoided lien no longer exists as a lien and the creditor no longer possesses any *in rem* rights arising from that former lien. As with the discharge of debt, the avoidance of liens, when and as applicable, promotes the debtor's fresh start as intended by Congress. The provisions of HB 836 which provide for the nondischargeability of liens which secure debts owed to Community Associations are also in direct conflict with the Congressional intent which provides for the avoidance of liens under certain circumstances.

Any attempt by a state statute or law to interfere or conflict with bankruptcy discharge issues is a violation of the Supremacy Clause of the US. Constitution found at U.S. Const. Art. VI, cl. 2. *Perez v. Campbell*, 402 U.S. 637, 649 (1971), *citing Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed 23 (1824)(Marshall, CJ)(acts of the State Legislatures *** which interfere with, or are contrary to the Laws of Congress, made in pursuance to the constitution, are invalid under the Supremacy Clause) *and Hines v. Davidowitz*, 312 U.S. 52 (1941)(Black, J)(in the final analysis, our function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress). *Perez* struck down as unconstitutional the Arizona Motor Vehicle Safety Responsibility Act in light of the Act's requirement that debts discharged in bankruptcy were still required to be paid for a debtor to regain driving privileges, *Perez, supra* at 656; see also *In re Shines*, 39 B.R. 879, 882 (Bkrtcy. E.D. Va 1984) (portion of Virginia Code held unconstitutional for creating a nondischargeable debt which was not included in the nondischargebility provisions of the bankruptcy code).

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Based on the foregoing analysis, the nondischargeability provisions of HB 836 are unconstitutional, conflict with the bankruptcy code, and violate the Supremacy Clause of the U.S. Constitution.

However, and more closer to home, the provisions of HB 836 also violate Article 2 of the Maryland Declaration of Rights. Article 2 provides as follows, to wit:

Article 2. United States constitution; laws and treaties supreme law of State

The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, *are, and shall be the Supreme Law of the State*; and the Judges of this State, and all the people of this State, are, and shall be bound thereby, anything in the Constitution or Law of this State to the contrary notwithstanding. (emphasis added),

MD CONST DECL OF RIGHTS, Art. 2

The Maryland Declaration of Rights, Art. 2 provides, *inter alia*, recognition of the Supremacy Clause of the U.S. Constitution. It has resulted in a holding that a state court must perform a function required under federal law in a case in which the function might otherwise violate Maryland separation of powers, *Simbaina v. Bunay*, 221 Md.App 440, 452 n.7 (2015)(court required to make SIJ findings under the federal Immigration and Nationality Act in Maryland divorce case with claim of impermissible judicial duties or state separation or powers superceded

by the Supremacy Clause of the U.S. Constitution and the similar federal supremacy obligation found in Declaration of Rights, Art. 2)(analysis approved by Maryland Court of Appeals, now Supreme Court of Maryland in *Romero v. Perez*, 463 Md 182, 191 (2019); and in a holding permitting the issuance of a handgun permit which had been denied under state statute following the decision of the Supreme Court of the United States in *New York State Rifle and Pistol Association, Inc., et al. v. Bruin*, 142 S.Ct. 2111(2022). *In re Rounds*, 225 Md.App. 205, 212-13 (2022)(after *Bruin,* Maryland's requirement that an applicant must have good and substantial reason for carrying a handgun violates the Second Amendment to the U.S. Constitution).

Clearly, for the foregoing reasons described herein, the Maryland Declaration of Rights, Art. 2 would prohibit HB 836 from being enacted into law.

Conclusion

For the reasons stated above, the Consumer Bankruptcy Section of the MSBA opposes HB 836 and respectfully urges an unfavorable committee report. For further information and for any questions, please contact Bud Stephen Tayman, Councilmember at btayman@taymanlaw.com.