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E-NEWSLETTER

Bankruptcy is not the End By Chad P. Miesen, Esq.

We have seen a large increase in bankruptcy filings in Arizona. According to the United States Bankruptcy Court for the District of Arizona, by the end of June there was an increase of bankruptcy filings of over 88% compared to the same time last year. A vast majority of this year's filings were filed under Chapter 7 of the Bankruptcy Code. What's more is that the empirical evidence seems to forecast even more filings to come.

So what is a community association to do? Are associations doomed to accept pennies on the dollar as soon as an owner files for bankruptcy protection? Not necessarily. Even though the majority of bankruptcy filings are under Chapter 7 (liquidation of the debtor's non-exempt assets), if the debtor remains the owner of property in the community, they remain responsible to pay assessments and certain other charges that accrue after the date of filing. Some bankruptcy attorneys in town still fail to recognize this, but this change has been in effect since 2005.

Prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), debtors who no longer lived in or rented out property in a homeowners or condominium association after the bankruptcy filing would not be obligated for assessments that accrued during that time. In essence, post-petition assessments (those that accrued after the date of the bankruptcy filing) were dischargeable unless the debtor still lived in the home or rented it out. This created a problem when debtors surrendered property in the bankruptcy, but the lenders were slow to foreclose. The result was that no one was paying the association and the association had nowhere to turn. Foreclosing the lien with an impending first mortgage foreclosure made little sense.

As part of the changes enacted with the BAPCPA, Congress amended 11 U.S.C. § 523(a)(16). Section 523(a)(16) now provides that as long as a debtor has ownership of property (legal, equitable, or possessory interest) in an association, they remain liable for the post-petition charges. The result is that even if a debtor has received a discharge from the bankruptcy court for pre-bankruptcy debt, until the debtor is no longer the owner of the property, he or she remains liable for assessments and certain other charges that accrue going back to the date of filing bankruptcy.

Associations can seek recovery of the post-petition charges through a variety of ways. As always, the real question is what action is appropriate that will not result in wasteful spending. As the appropriate action depends greatly on the association's governing documents and the specific details of the bankruptcy, a community association should discuss the matter with its legal counsel on a case-by-case basis.



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