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Bankruptcy – So What?

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With all the new bankruptcy case filings in the past couple of years, it is difficult to keep up with all the paperwork. Notices of new filings seem to come in the mail constantly. In light of this, it is important to understand the consequences for failure to take appropriate action.

What do you do when a notice of a bankruptcy filing comes in the mail? How about when a homeowner tells you in conversation that they filed bankruptcy? The truth is that accidentally overlooking that notice (whether by phone call, mail, or otherwise) and proceeding with standard collection or enforcement action can be devastating.

When a person files for bankruptcy protection under any chapter (7, 13, or 11), an "automatic stay" (basically like an injunction) becomes effective. This is found in 11 U.S.C. § 362(a). Its intent is to give the debtor a "breathing spell" from creditors, to stop foreclosures, collection efforts and creditor harassment. Absent a motion and order for stay relief, the stay of actions against the debtor continues in effect until the case is either closed, dismissed, or a discharge is entered, whichever occurs first.

Violation of the automatic stay is punishable by sanctions and can be costly. Sanctions for violation of the automatic stay can include actual damages incurred by the debtor as well as punitive damages in certain cases. The aggrieved debtor that can prove actual damages is also entitled to all attorneys' fees and costs for having to bring the case for sanctions to the court.

It is important that when notice of a bankruptcy filing is received that action is taken to ensure that any amount owing prior to the bankruptcy filing is not included in collection correspondence to the debtor. In addition, if you are anticipating proceeding with any collection or enforcement action after notice of a bankruptcy, stay relief should be obtained when appropriate.

Let us be clear – sanctions for violations of the automatic stay are not always imposed and they do require more than just a technical violation. Bankruptcy attorneys throw around the threat of sanctions all the time, but the truth is that only a willful violation of the automatic stay entitles a debtor to damages. A willful violation is an intentional act done with knowledge of the bankruptcy filing. The "willfulness" element goes to the deliberateness of the act that violated the stay – not the intent to violate the automatic stay. It is important to note, however,

that notice to a creditor of the automatic stay or bankruptcy filing may be oral or written, and may be given in any manner. Avoiding any violation of the automatic stay – technical or not – is highly recommended.

The “take-away” point here is that when you are informed of a bankruptcy, whether by personal interaction or mail, action must be taken. Not only will certain action allow an association the best chance of recovery of the pre-bankruptcy debt, but it will also ensure an association does not become liable to the debtor for sanctions.

Bankruptcy law can be complex and full of potholes. If you have questions or need assistance navigating this area of law it is recommended that you seek advice from association legal counsel. In our firm, please contact Chad Miesen or James Hazlewood, or paralegal Debbie Young.

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