

Responsibility for Payment of Post-Petition Assessments When an Owner Files for Bankruptcy

by
Kristofer D. Kasten
Michael C. Kim & Associates

Collection of unpaid assessments continues to be a hot topic within condominium and common interest community associations as the difficult economic climate persists. In our practice, we have noted the increase in unit owner's assessment delinquencies and mortgage foreclosures has been accompanied by an increase in bankruptcy filings. The purpose of this article is to remind the reader that a bankruptcy filing is not necessarily the end of the world when it comes to an association's ability to collect unpaid assessments.

The filing of a bankruptcy petition by a unit owner establishes an important demarcation point for associations to keep in mind. Specifically, it separates pre-petition (assessment) debt and post-petition (assessment) debt. Generally, in a bankruptcy proceeding, whether Chapter 7 or Chapter 13, it is the pre-petition debt (in other words, debts which accrued prior to the filing of the bankruptcy) that is being addressed. The debtor unit owner remains personally liable for the payment of post-petition assessments, which was not always the case in the past.

Initially, Courts in the 7th Federal Circuit, in which Illinois is located, held that all assessments (past and future) were a debt obligation arising before the filing of the bankruptcy petition and thus, were "pre-petition" debt. The effect of this holding resulted in a unit owner being discharged from ever having to pay any and all assessments.

Congress amended the United States Bankruptcy Code (the "Code") to address the inequity of the 7th Circuit Court's decision. This amendment provided that assessments that accrue after the filing of the bankruptcy petition (post-petition) would not be dischargeable debt if the unit owner actually resided in the unit or if the debtor rented the unit and received payments from the tenant. However, if a unit owner abandoned the unit or otherwise did not receive rental income for the unit, then the unit owner would not be responsible for payment of post-petition assessments.

In 2005, Congress again amended the Code, including an amendment to Section 523(a)(16), which addresses exceptions to discharge of debt. Specifically, Section 523(a)(16) now provides that a debtor is not discharged from 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 cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory 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.”

The practical effect of this new language is that a debtor unit owner remains responsible for all post-petition assessments as long as such debtor unit owner remains the owner of the subject property. In other words, there is no longer a residency or rental income requirement. This 2005 amendment is much more favorable to an association’s position and makes better sense in real world circumstances.

In summary, the filing of a bankruptcy petition by a delinquent unit owner does not mean that all unpaid assessments are uncollectable. Pursuant to the 2005 amendment to the United States Bankruptcy Code, a unit owner is responsible for making current payments of post-petition assessments for as long as such unit owner owns the unit. In the event the debtor unit owner fails to pay post-petition assessments, the association can seek relief from the bankruptcy stay and proceed with its collection remedies against the debtor unit owner for the unpaid post-petition assessments, including an eviction action and personal money judgment.

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