COMMUNITY MATTERS

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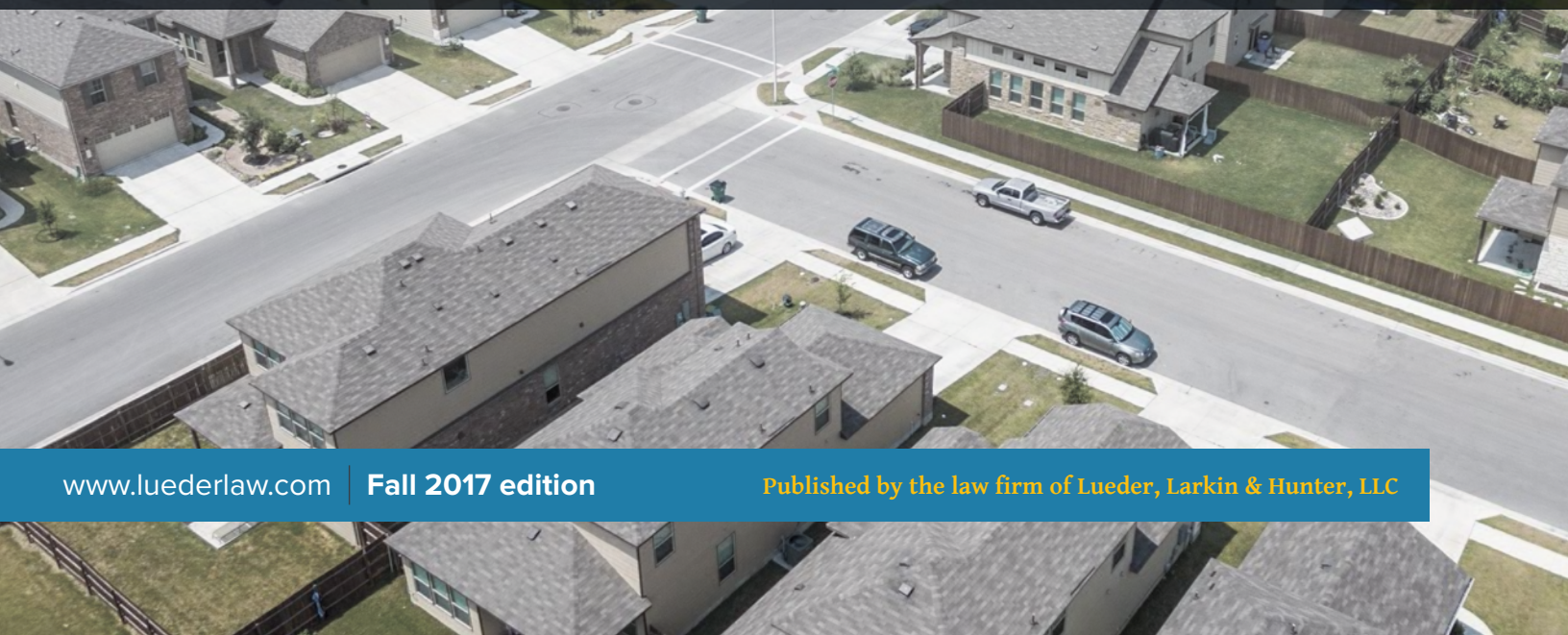
News and Trends in Community Association Law

Articles:



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Don't Miss the Boat: Important New Bankruptcy Rules, Forms, and Deadlines

by | **Daniel E. Melchi, Esq.**

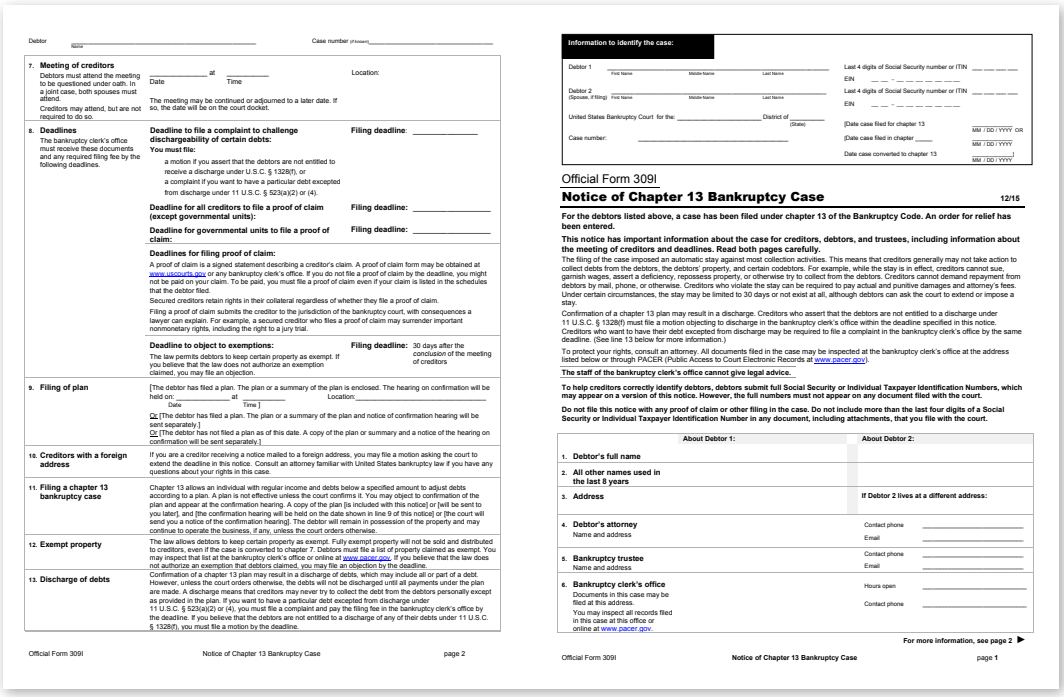
Community associations and their management companies, accounting firms, and other agents need to be aware of some important new rules, forms, and deadlines that go into effect on December 1, 2017 (the "Effective Date") that will have serious ramifications on community association claims and, ultimately, whether or not they get paid what they are owed in a homeowner's or former homeowner's bankruptcy case.

The most important change going into effect in all cases filed on or after the Effective Date is the new deadline for the filing of a Proof of Claim. Most creditors currently have 120 days to file a Proof of Claim. That number is nearly halved after the Effective Date, and most creditors will only have **70 days** from the bankruptcy filing date (or the date of a Chapter 7-to-Chapter 13 conversion) to file a Proof of Claim. Claims filed after this 70-day deadline may be disallowed by the debtor, the Chapter 13 Trustee, the bankruptcy judge, or any other objecting creditor whose own claim would be reduced by the allowance of the late-filed claim to be funded. It is very important that law firms be advised of a new bankruptcy filing immediately upon a community association or its agent learning of the bankruptcy case in order to meet this new, shortened timeline.

Next, the appearance of Chapter 13 Plans filed in the Northern District of Georgia will be different in bankruptcy cases filed after the Effective Date. The standard Chapter 13 Plan form for this jurisdiction will undergo a major overhaul. The most notable changes include the following: (1) the ability for debtors to strip community association liens in the proposed Chapter 13 Plan itself without the need to file additional motions, (2) the ability for debtors to avoid judicial liens without the need to file additional motions, and (3) the order in which the Chapter 13 Trustee will pay claims filed in the case. It is very important that a community association's law firm be able to review the Chapter 13 Plan in time to file an objection to confirmation of such Plan. This is especially so, if the Plan is attempting to do something that will negatively affect the community association's claim. Failure to object to confirmation of a Plan causes a creditor to waive such objections and adhere to the Plan as confirmed, even if that means not being paid or being paid in an unfair amount or manner.

When a community association or its agent receives a copy of a bankruptcy filing notice, this is definitely not a piece of paper that should be ignored, discarded, or set to the side for a "rainy day" to try to deal with. These notices come in the mail on one, front-and-back page, and may look innocuous, but they are extremely important. The graphic accompanying this article shows what a standard (albeit, blank) Chapter 13 bankruptcy filing notice looks like. Chapters 7, 11, and 12 notices look very similar.

The tightened deadlines and overhauled forms beginning on the Effective Date could negatively affect a community association unless it promptly notifies its law firm of the filing of a bankruptcy case in time to not only file a Proof of Claim, but also examine the bankruptcy Schedules and Plan. After all, filing a Proof of Claim when a creditor is not properly listed in a Plan will not get that claim paid, even if it is filed. If there is ever a question regarding the filing of a bankruptcy case, it is always better to ask sooner rather than later…when it may be too late.



Official Form 309I

Notice of Chapter 13 Bankruptcy Case 12/15

For the debtors listed above, a case has been filed under chapter 13 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, the debtors' property, and certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 13 plan may result in a discharge. Creditors who assert that the debtors are not entitled to a discharge under 11 U.S.C. § 1328(f) must file a motion objecting to discharge in the bankruptcy clerk's office within the deadline specified in this notice. Creditors who want to have their debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office by the same deadline. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1.	Debtor's full name	
2.	All other names used in the last 8 years	
3.	Address	If Debtor 2 lives at a different address:
4.	Debtor's attorney Name and address	Contact phone Email
5.	Bankruptcy trustee Name and address	Contact phone Email
6.	Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.	Hours open Contact phone

For more information, see page 2 ▶

Official Form 309I Notice of Chapter 13 Bankruptcy Case page 1

Official Form 309I Notice of Chapter 13 Bankruptcy Case page 2

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The Practical Guide for Enforcement

by | **John T. Lueder, Esq.**

People break rules. When God told Adam and Eve not to eat the fruit, what did they do? They ate the fruit. When you serve as a director on your community association board, you will most likely run into a situation where a homeowner violates the rules or covenants of your association. You cannot, of course, banish the owner from your community – your Garden of Eden – if we continue with our analogy. However, there are steps you can take to get the owner to come into compliance.

The first step we generally recommend is to inform the owner of the violation. We are often surprised at how many owners respond that they were not aware that their activities were violations. While we do not know how many of those owners are simply saying that, we do know that notifying an owner of a violation often has the result of the owner coming into compliance.

But what if an owner knows that he or she is committing a violation and ignores you? There are, unfortunately, many, many, many owners who do not care about the rules, or who do not believe the rules apply to them, etc. In that event, we recommend fines. When deciding to assess a fine, there are several practical considerations to take into account. For starters, do your governing documents authorize fines? Is there a fining due process procedure? What is an appropriate fine amount? Is the violation continuing every day or sporadically?

What about self-help? Should your association or its agent enter upon the owner's property and remedy the violation? Our firm generally does not recommend exercising self-help (also known as the right of abatement) for larger violations. By way of example, it is generally okay to exercise self-help for mowing an owner's overgrown grass, but not for repainting the owner's house. And if your community is a condominium, the exercise of self-help can open the door to a host of other issues. Before exercising self-help, please contact your association's legal counsel to discuss the important practical and legal considerations.

There are other enforcement tools, too, such as suspending voting rights and suspending an owner's or occupant's use of the common areas. We often find that most owners with violations do not care if their voting rights are suspended. Suspending use rights, on the other hand, can be hit or miss. While many owners will not be very concerned if they cannot use a community pool, owners usually do take notice if their right to use a community parking lot or parking garage is suspended, especially if they live in a condominium or townhome community. Again, before undertaking such enforcement options, we advise you seek guidance from your association's legal counsel. We run into far too many situations where an owner has improperly had his or her right to park a vehicle suspending without the suspension procedure correctly being followed. A review of the issues beforehand can avoid very real legal problems later if the suspension is not properly done.

That brings us to the granddaddy of remedies: the enforcement lawsuit. A question that deserves thoughtful contemplation is: When should an association sue an owner to force compliance? A host of other questions arise and deserve similar contemplation. For example: How serious or blatant is the violation? Does most of the community know of the violation, and if so, will non-enforcement lead to other owners also deciding to ignore the rules? Also, if the board allows the violation to continue, will that set a precedent that the rule or covenant at issue cannot be later enforced against other owners? Does that rule or covenant become meaningless by the board's inaction? Is it an important rule or covenant that the board does not want to risk losing?

Further, the cost of an enforcement lawsuit must be considered. We have seen that many owners come into compliance once a sheriff's deputy serves the owner with a lawsuit and realizes how serious the matter has become. Other owners decide to fight, as some wrongly believe that nobody has a right to tell them what they can or cannot do on their property. Most governing documents, and in many instances Georgia law, will permit the attorney's fees incurred in an enforcement case to be awarded against the violating owner.

In the end, when you agree to be a board member, that comes with the obligation to work in the best interests of your community association. Most of us will find that the best interests of the association includes enforcing the rules and regulations. Enforcement of the rules and covenants is a necessary situation, even when that can turn into an unpleasant situation, especially for the violating owner. In that regard, there are many potential issues that may need to be addressed, so be sure to contact your association's attorney. If we serve as your association's attorney, we have vast experience in community association law, and we are always here to help you through the process.

Bankruptcy's Effect on Covenant Enforcement and Collection of Fines

by | **Andrew G. Grattan, Esq.**

Most of us are familiar with the classic bankruptcy case in the context of homeowners associations: a homeowner, indebted to an association, files for bankruptcy and collection freezes.

The automatic stay takes effect, and the association must await dismissal or discharge. A dismissal allows the association to proceed accordingly. A discharge relieves the debtor of personal liability from the petition date and backwards. Less familiar, however, is what effect bankruptcy has on an association's ability to enforce its covenants. We will examine what remedies are available to an association when a violating owner seeks refuge in a Chapter 7 or Chapter 13 bankruptcy.

When an owner files bankruptcy, all property he or she owns including any real property, becomes property of the bankruptcy estate and thus the responsibility of the bankruptcy trustee. In addition, the bankruptcy stay prevents a creditor from taking any action against the property, including self-help or the imposition of fines. So what happens if an owner, who has failed to maintain his property, files for bankruptcy? Must the association sit back and wait to see the outcome of the bankruptcy?

Just as a creditor may not take any action against the real property, the trustee is obligated to ensure that the property does not deteriorate or lose value. That is, if a Chapter 13 debtor is not maintaining the property (as set forth in the association's governing documents), a community association may object to the confirmation of the bankruptcy plan. The argument the association is making is that the real property is a part of the bankruptcy estate which becomes the source of repayment of the debtor's debts. Therefore, if the owner is not maintaining the property, its value is harmed, and the association may object. Likewise, if the owner is leasing in violation of the covenants and intends to use that rental income to repay debts, the association may also object to a Chapter 13 plan confirmation. After all, it would be inappropriate to allow a Chapter 13 plan to be confirmed when one of the things funding such plan (i.e., leasing) is forbidden in the first place.

The association is also protected when a violating owner files bankruptcy under Chapter 7. The association has two options in this scenario: first, it might seek to work out an agreement with the trustee whereby the association takes possession of the property and may therefore ensure it complies with the covenants. However, this may not be a realistic option as the association may not be in a financial position to do so. Another option is for the association to seek to have the automatic stay lifted in order to proceed with a covenant enforcement lawsuit against the owner to compel the owner to comply with the covenants. This is the more likely scenario as the association can likely show cause to have the stay lifted when the owner is allowing the property to fall into disrepair or otherwise allows the property to be used for an improper purpose.

But what happens in a case where the violation arises after the owner has filed bankruptcy? Imagine a scenario where an owner files bankruptcy and thereafter fails to maintain the property in conformity with the covenants. Is the association forced to await the outcome of the bankruptcy case which can take many years, in some cases? Again, the association is not without options. Just as assessments will continue to accrue against a debtor after the bankruptcy petition date, the association may fine the violating owner after the filing of bankruptcy for violations that first occur after the petition date. Those fines become post-petition debt. In addition to fining, the association may petition the bankruptcy court to allow the association to exercise self-help (assuming the covenants allow self-help). The costs of abatement may be levied against the owner as an administrative expense, and the association may then ask that those administrative expenses be paid though the bankruptcy case as a priority claim since they were incurred to benefit the bankruptcy estate. Lastly, in the case of a major violation such as an unapproved exterior modification, the association could request permission from the court to seek a temporary restraining order against the owner, enjoining him from constructing the unapproved alteration.

In sum, the association is not out of luck when a violating owner files bankruptcy. It may petition the Bankruptcy Court and request that the property be brought into compliance with the association's governing documents, or alternatively, it may ask that court to permit it to conduct self-help. In deciding which of the above-noted remedies is best, the association should look to the violation at issue and the type (Chapter 13 or Chapter 7) of bankruptcy filed.

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