COMMUNITY MATTERS

Lueder, Larkin & Hunter

News and Trends in Community Association Law

Articles:

- Serial Filers: Never-ending, Repeated Bankruptcy Filings by the Same Homeowner
- Is It Time to File a Lawsuit? A Statute of Limitations Discussion
- An Overview on Judicial Foreclosure for Associations
- Attorney Spotlight: Mark J. Edwards

www.luederlaw.com | Late Summer 2016 edition Published by the law firm of Lueder, Larkin & Hunter, LLC

Serial Filers: Never-ending, Repeated Bankruptcy Filings by the Same Homeowner

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

"Why is this homeowner allowed to keep refiling for bankruptcy?!"
"How many times is this homeowner allowed to file for bankruptcy?!"

Our association clients and their managing agents ask these questions at least once a week. "It is just not fair! They are gaming the system!" they exclaim. It certainly seems that way, doesn't it? But using the Bankruptcy Code to a debtor's advantage, including refiling a new bankruptcy case after an old case has been dismissed or even after a discharge has already been granted in an earlier case, is not illegal, although it creates a headache for creditors.

Whenever a debtor has multiple bankruptcy cases, especially over a short period of time, there are two different legal concepts that are important to be able to understand and differentiate: (1) *stay applicability* (whether or not the "automatic stay" against creditor actions is in effect and to what extent is it in effect in the later-filed case) and (2) *dischargeability* (the ability of a debtor to obtain a discharge in a later-filed case). These concepts are explained below in more detail.

Stay applicability: Whenever a debtor files a petition for bankruptcy, an automatic stay takes effect which *usually* prohibits all collection efforts against a debtor for pre-petition debts. The operative word is "usually," but this rule is not an absolute with respect to serial filers. The deviation of this rule is where it can get tricky. The law was updated to limit the effect of stays in serially-filed bankruptcy cases. That law is known as the "Bankruptcy Abuse Prevention and Consumer Protection Act" which became effective in 2005.

Here is an example: Suppose a debtor files a bankruptcy and it is dismissed, as opposed to being discharged. If a debtor files a second case within a one-year period of a prior case being dismissed, the stay goes into effect in the second case immediately upon the second case's filing; however, the stay terminates on the thirtieth day following the filing date as to actions against the debtor, but not the debtor's *property*. So, on that thirtieth day, a creditor can continue a lawsuit that was already filed against a debtor and obtain a judgment. However, on or after that thirtieth day, the creditor *cannot* file liens, garnish wages or bank accounts, suspend parking, or take other actions against the debtor's property. Additionally, the debtor may file a motion to extend the stay as to actions against the debtor if the debtor can prove to the bankruptcy judge that the second case was filed in good faith. As you can see, this part of the current law is not all that helpful because it is so particular and limiting.

If a debtor files a third case (or more) within a one-year period of two prior cases being dismissed, then no stay at all takes effect in the third-filed case, including against the debtor or the debtor's property. That means that a creditor can carry on with collection efforts as if the third case had not been filed. If, however, within 30 days of the third-filed case's filing date, the debtor files a motion to impose a stay and that motion is later granted, a stay will be imposed and cause all collection efforts to cease as of the date that the stay imposition order is granted. In order for a debtor to have a stay imposed in such a case, the debtor must prove to the bankruptcy judge that the third-filed case was filed in good faith.

Dischargeability: Sometimes a community association will find that a debtor obtained a Chapter 7 discharge and then immediately files a Chapter 13 case. "Why are they allowed to do that?!" Well, in the bankruptcy "biz," that scenario is referred to as a "Chapter 20." (Get it? 7 + 13…?) Debtors sometimes do this because they want to discharge their unsecured debt in a Chapter 7 and then repay their secured creditors in a Chapter 13 case. Debtors can sometimes do this if they are able to prove that the subsequently-filed Chapter 13 case was filed in good faith. Perhaps the amount of unsecured in the debt prior Chapter 7 case exceeded the Code limits for a Chapter 13, therefore their first case could not have been filed under Chapter 13. Or sometimes a debtor will have mistakenly thought that a community association would not foreclose its surviving pre-petition lien after the Chapter 7 case was over, only to realize this was not the case. The debtor may then decide to file a Chapter 13 to take advantage of the automatic stay and allow the debtor to pay off the lien in a Chapter 13 Plan.

A debtor may be able to take advantage of the stay and reorganize under the Code by filing a new bankruptcy case after receiving a discharge in a previous case (like in the paragraph above), but there are limits as to whether debtors will receive a discharge in the subsequently-filed case after receiving a discharge in a first case. The accompanying chart to this article shows the "bar time" between discharge eligibility depending upon under which Chapter a discharge was obtained in the first case and the Chapter under which the subsequently-filed case has been filed.

While the serial-filing of bankruptcy cases appears to be unfair to creditors and is certain frustrating to collection efforts, it is not illegal, and there is generally no bar to it. Under certain circumstances, a case may be "dismissed with prejudice" for a period of time, barring the debtor from refiling any new case for a time period specified by the bankruptcy judge. There is also the option of obtaining *in rem* relief from the stay that specifies that the stay will remain lifted as to actions against the debtor's property for a period of two years, including in any subsequently-filed cases. If a debtor is filing serial cases, a community association should consult its attorney to discuss its options in putting an end to it.

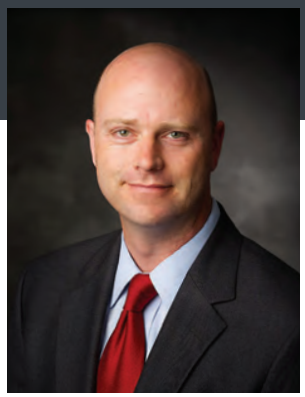
DISCHARGE ELIGIBILITY

Time That Must Pass Between First Case's Filing Date and Second Case's Filing Date for Second Case to be Eligible for a Discharge

Chapter Under Which First Case's Discharge Was Entered	7	13
7	8 years	4 years
13	6 years[1]	2 years

1. Or (a) immediately if 100% of unsecured creditors were paid in the Chapter 13 case or (b) immediately if 70% of unsecured creditors were paid in the Chapter 13 case, the Chapter 13 Plan was proposed in good faith, and "was the debtor's best effort."

Is It Time to File a Lawsuit?
A Statute of Limitations Discussion



by | **Brendan R. Hunter, Esq.**

Pursuant to Georgia law, there is a two-year statute of limitations for violations of restrictive covenants and a four-year statute of limitations for failure to pay assessments. The statute of limitations begins to run immediately upon the violation of the restrictive covenant.

Pursuant to Georgia law, there is a two-year statute of limitations for violations of restrictive covenants and a four-year statute of limitations for failure to pay assessments. The statute of limitations begins to run immediately upon the violation of the restrictive covenant. If the association does not file a lawsuit and serve the owner within the applicable statute of limitation period, the Association's claims for the violation may be barred.

Many associations struggle to determine when the right of action actually begins. For permanent fixtures, the answer can be easily determined. For instance, if an owner installs a fence without architectural committee approval, the right of action begins immediately upon the owner installing the fence.

But what about continuing violations? Georgia courts have adopted the continuing violation rule for certain types of violations. *In Black Island Homeowners Ass'n, Inc. v. George Marra,* the Georgia Court of Appeals adopted such a rule and held that each time the association mowed an undisturbed area in violation of a restrictive covenant, the mowing was deemed to be a distinct, separate act that constituted a breach each time it occurred. Therefore, the right of action accrued each time the violation was committed.

The appellate court followed its holding in *Marino v. Clary Lakes Homeowners Ass'n, Inc.* regarding a parking violation. More specifically, the Court of Appeals determined that the parking violation did not involve a permanent fixture, but rather, each time the owners parked their car in violation of the restrictive covenant, it was a separate and distinct act that gave rise to a new cause of action for the alleged violation.

Black Island and *Marino* and the continuing violation rule were then called into question by the same appellate court in *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, Inc.* The Court's initial opinion attempted to overturn the holdings in *Black Island* and *Marino*, finding that under the express language of the statute, the limitation period begins to run "immediately" upon a property owner's *first* "use" of his or her property in violation of a restrictive covenant. However, upon a motion for reconsideration, the Court determined that it did not have enough votes to overturn *Black Island* and *Marino*. Therefore, the Court found that the continuing violation theory announced in *Black Island* and *Marino* remains good law.

Thereafter, the same appellate court reiterated that the continuing violation rule is still good law in *Marks v. Flowers Crossing Cmty. Ass'n, Inc.* However, the Court of Appeals clarified that this rule only applies where there are separate and distinct repetitive acts. Thus, the continuing violation rule does not apply in cases involving fixtures or where no separate and repetitive act constituting the violation is shown. Rather, in cases not involving separate and distinct violations, the right of action accrues immediately upon the violation of the covenant.

Based upon these recent holdings, and the current trend of the Court of Appeals in narrowly applying the continuing violation rule, it is imperative that associations take appropriate legal action timely. Permitting a violation to continue without taking such legal action may result in adverse consequences to the association in enforcing a covenant against a violator.

An Overview on Judicial Foreclosure for Associations

by | **Harrison J. Woodworth, Esq.**

An association's right to foreclose on its lien can be a powerful tool to use against an owner who either refuses, or simply cannot afford, to pay association assessments. The prerequisites for starting a foreclosure action depend on the association and its governing documents. Does the association even have the authority to foreclose? Many do, whether it is a common law homeowners association or an association subject to the Georgia Condominium Act or the Georgia Property Owners' Association Act. The association's status as either a common law homeowners' association or an association that is subject to one of the Acts will also help determine when, and if, the association should proceed with a foreclosure action.

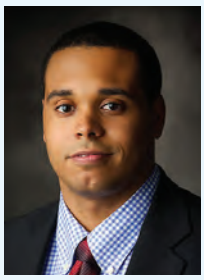
Once the ability to foreclose has been determined to exist and the owner has been properly notified and warned of the intended foreclosure action, the association has to obtain an order from the Superior Court allowing the association to foreclose upon the lien. This part of the process generally unfolds in the same way as any other lawsuit for covenant enforcement or damages for unpaid assessments: the complaint is filed, the owner has to be located and served with the lawsuit, and the matter litigated to the point of a final judgment being entered. The judgment that is entered allowing the association to foreclose on its lien will typically include a statement of the amount of the association's lien and instructions to the county sheriff regarding levying on the property and how the sale itself will be conducted.

Once a foreclosure order has been obtained, an association will then have the ability to contact the county sheriff to begin the foreclosure sale process and set a date for the sale. It is important to note that the association is not *required* to actually proceed with the foreclosure sale; having the foreclosure order gives the association that option in the future. If the association does want to proceed with the foreclosure, the next step is to contact the county sheriff to find out what the sheriff needs to set the sale. The requirements vary by county, but common items are: the original judgment, a writ of *fieri facias*, a written request by the association for the sheriff to levy upon the property, a published notice of foreclosure sale, a certificate of title from a licensed attorney, and a check to pay the sheriff's levy fee.

Once all the required items are sent to the sheriff, the sheriff's office will handle setting the sale date, mailing the required notices, publishing the notice of sale, and conducting the sale itself on the foreclosure sale day. The association may bid on the property at the sale as long as their governing documents provide that power, and most do. The purchaser at the foreclosure sale is responsible for payment of assessments from the date of the sale going forward, and any other obligations as property owner. Regardless of whether the association purchases the property or it goes to a third-party, the new owner will then need to take possession of the property and get the old owner out.

A good practice is to send a formal demand to the former owner to vacate the premises along with a copy of the recorded sheriff's deed showing the association's ownership of the property. If the now former owner complies, this will save the association time and money in the long run. If the former owner does not, the association will file a dispossessory action, serve the former owner, and seek a writ of possession from the court. Once the writ is entered, the association will coordinate with the local marshal to schedule the actual physical eviction from the property. This will typically involve the association hiring a bonded eviction company to conduct the eviction and change the locks, while the marshal is present.

The association's legal counsel should be consulted, whenever foreclosure is contemplated, to ensure the process is completed in compliance with both the association's governing documents, and Georgia statutory requirements.



Attorney Spotlight:
Mark J. Edwards, Esq.

Mark J. Edwards joined our firm in September, 2015. Prior to joining the firm, Mark was a criminal defense attorney litigating misdemeanor cases in Clayton and Henry Counties. Mark handled indigent defendant cases involving DUIs, marijuana possessions, petty thefts, batteries, among other misdemeanors. In addition, Mark obtained his certification as mediator with the Georgia Commission on Dispute Resolution. Mark has mediated hundreds of cases to the satisfaction of both parties.

As a graduate of Georgia State University College of Law, Morehouse College, and Centennial High School, Mark is a true product of the Atlanta area educational system. Originally from Chicago, Mark moved to Atlanta when he was nine years old. Although born in Chicago, Mark is proud to have been raised in Atlanta.

When not at work, Mark loves hanging out at Atlanta's most popular attractions. You may find Mark jogging on the beltline, golfing at Top Golf, attending a festival, relaxing at Piedmont Park, or watching a game at one of Atlanta's most popular sports bars.

We are proud to have Mark at our firm and excited to feature him in this Attorney Spotlight.

LUEDER, LARKIN & HUNTER

t: 770.685.7000 f: 770.685.7002

www.luederlaw.com | email: newsletter@luederlaw.com