COMMUNITY MATTERS

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News and Trends in Community Association Law

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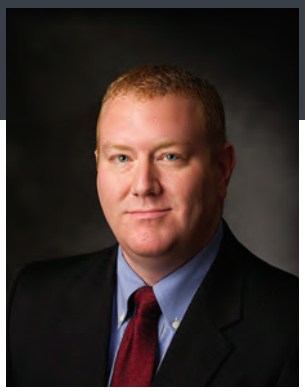

What Does a "Bankruptcy Stay" Really Stay?

Explaining the "Automatic Stay" and what exactly it is

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

Whenever a debtor files for bankruptcy, your association's attorney tells you that you can't continue regular collection activities, and he or she tells you that you can do this, and you cannot do that, but you can do this if this condition exists, but you can't do that if that condition exists...

"Is there a method to this madness, or is he just making this up as he goes along?" you wonder. Believe it or not, there actually is a reason behind the varying instructions you get from your association's attorney regarding what is and what is not stayed when a bankruptcy case gets filed.

An important starting point might be to get some basic lingo down from the get-go regarding property. It is important to know that whenever a debtor files a petition for bankruptcy, under any chapter, all of the debtor's property ceases to be the debtor's property anymore, and all of the property automatically becomes "property of the bankruptcy estate." The debtor's house, car, furniture, food, goldfish, underwear, etc. – all become part of the estate. Like any "estate," this estate has a Trustee. That is the Chapter 7, 11, or 13 Trustee. The Trustee has all control over all "property of the estate" for as long as the bankruptcy case is active or unless the Trustee "abandons" property from the estate (at which time such property would again become property of the debtor, outside of the estate).

Next, what exactly is this mysterious "automatic stay"? You have all heard your association's attorney and others speak of it in reverence, but does it even really exist? Oh, it does. The automatic stay statute is just one section of the Bankruptcy Code, jammed somewhere in the middle of it all, and the entire statute is several pages long. Subpart "(a)" is the most important part because that is where the eight "no-noes" of what creditors cannot do during an automatic stay are located. With respect to community association creditors, only the first seven matter. (The eighth has to do with the U.S. Tax Court.) In the sidebar, take a look at the "seven deadlies." These seven things cannot be done without first obtaining permission to do so from the Bankruptcy Court by having the "stay" lifted or modified.

In very basic terms, the seven things community association creditors must avoid when a stay is in effect include:

(1) Do not start or continue a lawsuit for a pre-petition debt.

(2) Do not enforce a pre-petition judgment against the debtor or property of the estate.

(3) Do not take any action that, in any way, "exercises control" over property of the estate.

(4) Do not file a lien against property of the estate.

(5) Do not try to enforce a lien against property that the Trustee has "abandoned" from the estate and gone back to being property of the debtor if the lien arose from a pre-petition claim.

(6) Do not try to recover a claim, in any way at all, that was incurred pre-petition.

(7) Do not say, "Well, the debtor owes us $100, and we owe the debtor $100, so I guess we're even."

Now that we know what is actually "stayed," let us look at some situations that come up every single day with community associations, and let us see which section of the Automatic Stay statute tells us whether or not we can take a certain action.

Situation 1: Debtor is not paying his post-petition account. Community association wants to file a lien. "The lien is only for the post-petition, so it's okay," Tommy Treasurer says. Does this violate the automatic stay? Yes. It clearly violates #4, even if the lien is being filed for post-petition debt. (This is why we had the lesson about "property of the estate" earlier.)

Situation 2: Debtor is not paying his post-petition account. Tommy Treasurer wants to bar the debtor from using the pool. Does this violate the automatic stay? Maybe. If the community association is a common law HOA or POA that owns the pool facilities (i.e., the pool is not part of the estate), it probably does not violate any of the seven stayed items. If the community association is a COA, it probably does violate #3 because each owner of a condominium usually owns a fractional part of the common elements, including the pool. Therefore, restricting access to the pool would be "exercising control" over property of the bankruptcy estate.

Situation 3: Debtor painted his house with an unauthorized color scheme pre-petition. The community association began fining the debtor $25 per day until he repainted it. The debtor files bankruptcy. May the fines continue? No. The continuing fines are from a pre-petition "claim," and therefore, #6 blocks the fines from accruing post-petition.

Situation 4: Debtor owes the community association $1,000 pre-petition. The association really could use the money, but the debtor filed bankruptcy. The debtor and Tommy Treasurer are friends. Tommy casually tells the debtor, "Hey, I bet if you agreed to pay $250, the Board would erase the other $750 you owe. Whaddaya say?" Tommy violated #6.

Situation 5: Debtor does odd jobs, including repairing fences. Debtor owes the community association $2,000 for pre-petition assessments. Debtor does $2,500 worth of repairs for the community association. Debtor files bankruptcy. Tommy Treasurer looks at the books, and then writes debtor a check for $500. Tommy violated #7.

Situation 6: Community association is a POA, owning all parking spaces in the neighborhood. Debtor fails to pay post-petition assessments. Community association follows the proper procedures to suspend parking privileges, but only for the post-petition assessments. Stay violation? This is a tough one. Remember, all the property of

the debtor is property of the bankruptcy estate, so towing the debtor's car would seem to violate #3 above since towing a car would seem to be exercising control over property of the estate, right? But it would be an absurdity to say that a debtor could go park his estate-property-car in the middle of Georgia 400 during rush hour and then tell any tow truck driver, "Ah, ah, ah… No touching. Property of the estate!" The stay statute is not meant to allow "trespassing" or other unauthorized activity. This one could go either way. Switch it up a bit: What if this were a COA? Less difficult: suspending the parking privileges in the first place likely violates #3 since a COA debtor likely owns a fractional share of the parking space or the parking space outright, and that would be part of the bankruptcy estate.

This is not to say that once bankruptcy is filed, the debtor has carte blanche to do whatever the debtor wants. But it does mean that, oftentimes, a community association will need to bring the matter to the Bankruptcy Court's attention and then ask that the bankruptcy stay be lifted to allow certain actions to be taken.

It is important to know that violation of the bankruptcy stay can subject the violator to serious sanctions in the Bankruptcy Court, including heavy fines and, in wonton or repeated cases, imprisonment for contempt of court. When there are questions about whether you can do something, it is probably best to wait until you run it by your association's attorney.

11 U.S.C. § 362: Automatic Stay

(a) …a [bankruptcy] petition filed…operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; [and]

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor…

Important Considerations for Adopting Amendments

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

Many amendments to covenants can be very beneficial for the effective operation of your community association. Amendments can better define the rights and responsibilities of owners and the association, including clarifying maintenance obligations. Amendments can also address issues your association is facing, including adopting leasing restrictions.

While the benefits of amendments are clear, adopting such amendments can present certain procedural challenges; however, with proper planning, these challenges can be greatly reduced.

The first thing to determine is the total number approvals necessary to pass an amendment. This is dependent on the specific language of your covenants. This can also, in certain situations, depend upon the subject matter of the amendment.

Additionally, the association must determine who is eligible to vote for an amendment. Again, this is dependent on the specific language of your governing documents. For instance, some associations' governing documents provide for suspension of voting rights if an owner is delinquent in the payment of assessments; however, it is important to review the governing documents to determine if such suspension is automatic or requires notice to the owner.

The second thing to consider is the process the association is going to utilize to obtain owner approval. Many of our associations have had great success using proxies to obtain owner approval.

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With this process, the association sends a copy of the amendment, together with a proxy, to the owners. Generally, such proxies are valid for a period of eleven (11) months. Once the association receives the sufficient number of proxies to pass the amendment, the association then sends a notice of a special meeting to the members. At the special meeting, the association holds a vote and utilizes the proxies to pass the amendment. With this process, there are a few issues the association needs to consider: The association must ensure the special meeting is held within 11 months of the proxies being executed. Further, the association must determine if the proxies can be counted towards establishing quorum.

Third, there are certain practical considerations the association should consider. It is generally advisable to obtain more approvals than necessary. That way, if some of the approvals are deemed invalid, the amendment can still be enforceable. Likewise, it is recommended to review the approvals for accuracy during the process to ensure the proper parties have executed the approval forms. Reviewing the approval forms during the process can help reduce the potential of the association facing these issues under a time constraint. To this end, it is important that the association maintain accurate and up-to-date information on the owners. This can significantly reduce the possibility of error and decrease the amount of time it takes to review the approval forms.

Utilizing volunteers to obtain approval forms is also beneficial. Depending upon the size of your community, by splitting up the neighborhood by streets or blocks, the association can appoint volunteers to collect approval forms from the owners in such sections.

Considering these factors and utilizing these procedures can reduce the amount of work it will take to pass an amendment, increase the possibility of obtaining the requisite approvals, and reduce the likelihood of potential procedural challenges to amendments. Please confer with your association's legal counsel for continued guidance before, during, and after the process of proposing an amendment.

How the "Under 18 Needing Adult Supervision" Pool Rule Can Present Legal Concerns

by | **Haley J. Bourret, Esq.**

As Spring approaches, many community associations prepare for their annual pool season by reviewing bids for services from pool-maintenance companies, investing in new pool furniture, and planning social events for their members. Others take on the somewhat less common, but equally important, task of creating or reviewing the association's pool rules and regulations.

In many communities, the pool rules and regulations are posted on a placard or sign that is installed in or around the pool area. Common rules and regulations include the hours during which the pool area is open and prohibitions on running, roughhousing, horseplay, glass, and excessive noise. Another common rule is that children under the age of 18 are not permitted to be at the pool without adult supervision.

Common sense tells us that most of these rules are put in place for the safety or comfort of pool users. Running or roughhousing around a slippery pool deck could result in an injury, broken glass in an area where people are generally barefoot is a safety concern, and excessive noise can create an uncomfortable environment for pool users. Likewise, the common sense purpose behind requiring that children under the age of 18 be accompanied by an adult is to prevent children from being hurt, and to prevent liability for the association. However, many people are surprised to find that such a rule is actually a potential source of liability for the association because the rule may be challenged as discriminatory.

The Fair Housing Act ("FHA"), which applies to community associations, prohibits discrimination "in any activities related to the sale, rental or use of a dwelling because of race, color, religion, sex, handicap, familial status or national origin." The "use" of a dwelling also includes the use of the common areas or amenities in the community. One of the most common ways an association might discriminate based on familial status is by denying a person the use of an amenity by creating or enforcing a rule based on age, such as the example used above.

Some state and federal courts have found that rules or regulations which create "adults only" swim time discriminate against families with children because it denies them use of the common amenity. Courts in several jurisdictions have also found that rules requiring children under the age of 18 to be accompanied by an adult are discriminatory, and are not the least restrictive means to meet a compelling necessity of the association (such as safety and peaceful enjoyment). If an association is found to have created or enforced a rule that discriminates based on familial status, strict penalties may apply. Because of this, our recommendation has generally been to create and enforce rules based on conduct rather than age or familial status.

If an association is in the process of creating or reviewing rules and regulations for the upcoming pool season, keep in mind that although the purpose of the rule may be to create a safe and comfortable environment for pool users, certain rules may have a discriminatory impact if they are based on the age of a minor and affect those with families. If you have questions about whether or not the FHA applies to your community or about how to create and enforce pool rules and regulations which do not run afoul of the FHA, please contact our firm.

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