KEOUGH MOODY

May 2021 Newsletter

And just like that - it is May!

Our newsletters earlier this year included a series of articles related to communication. This month we begin a new series of articles on what associations can do to maximize their ability to collect assessments. We often talk about eviction cases and obtaining judgments for possessions against unit owners. However, there are other ways an association can collect what is due and owing to them. In this edition, we focus what can be done when an owner files for bankruptcy protection.

We would like to thank all of you who have been participating in our monthly webinars. We enjoy presenting these to you and are always open to hearing your ideas for topics. We have an interesting, and we believe, fun idea for June's webinar that requires your participation. See below for more information and be sure to join us for the fun. Who will be stumped first - Gabby or Dawn???!!

As always, thank you for your support!

Chuck, Dawn and Gabby

KEOUGH & MOODY WEBINAR: COMMON MYTHS RELATED TO COMMUNITY ASSOCIATIONS

May 19, 2021 at 12:00 p.m.

1 hour of continuing education credit will be provided

Join Gabriella Comstock and Dawn Moody on Wednesday May 19, 2021, from 12:00 p.m. to 1:15 p.m., and debunk common myths! We often hear our clients and/or agents make certain conclusory statements that leave us scratching our heads. These are the statements we hear people repeat over and over again and they really do not know why they believe them – they just do. So, join Dawn and Gabby as they explain why these statements may or may not be true. Come and learn how to avoid following certain common misstatements! At the end of the Webinar, Dawn and Gabby will also take your questions.

Attendees can register here: http://events.constantcontact.com/register/event?llr=gyjn4vdab&oeidk=a07ehyb5j64358c849a

"Common Myths Related to Community Associations" is approved by Community Association Managers International Certification Board (CAMICB) to fulfill

continuing education requirements for the CMCA® certification.

KEOUGH & MOODY WEBINAR: WHAT WOULD YOU DO??

June 16, 2021 at 12:00 p.m.

How many times have you seen a situation arise within the association that you manage or live, and you thought, "I wonder what the attorney would do?" How many times did you have a question and want to know what would the attorney do, but were a bit gun shy to ask during the presentation? How many times did you want to know what the attorney would do, but the budget did not warrant incurring the attorney's fees? And how many times did you just want to try and stump an attorney? Well, June 16th is the day for you to get your chance to all of the above!! Join the attorneys of Keough & Moody in a webinar where YOUR questions will be the subject of the presentation and the fun!

In addition to registering for this webinar, to participate, you must email your questions in advance to Jonathan Wassell at **jdw@kmlegal.com**. Jon is the only one who will review your questions in advance. He will then randomly present the questions to Gabby and Dawn. The person with the most challenging questions who truly stumps (or comes close to stumping) Gabby or Dawn will win a prize! Please remember, questions cannot require the attorneys to be familiar with an association's governing documents. In addition, the answers to the questions are not intended to be and should not be considered legal advice to any specific situation or association.

Please submit your questions by June 14, 2021. We hope you join us for what will likely be a fun and different webinar!

As Vaccines Expand and COVID Retreats, How Should Associations Respond

Earlier this week, Governor Pritzker and Chicago Mayor Lightfoot held a joint press conference to announce the continued relaxation of COVID-related restrictions. Governor Pritzker announced that – if current trends continue – the State of Illinois should be fully reopened by the July 4th holiday. Further, as early as next week, Illinois may enter the "Bridge Phase", which will come with further loosening of restrictions. The loosening of restrictions, and the expanding availability of vaccines, will affect associations as discussed below.

The Bridge Phase – What it Means for Associations: The Bridge Phase will introduce higher capacity limitations for most situations, many of which will affect associations. For example, fitness center capacity will be expanded to 60%; indoor recreation will be increased to 100 participants (up from 50) or 50% normal capacity, whichever is less; indoor social events will be expanded to 250 participants, and outdoor social events may have up to 500 participants. Associations with clubhouses, outdoor recreation areas, or which host resident events should be prepared to adjust capacity limitations accordingly, including revising posted signage.

Vaccine and Mask Requirements: Mask guidelines have also been recently relaxed by the Centers for Disease Control. Acknowledging the reduced spread of COVID outdoors, plus the increased rate of vaccination, masks are no longer recommended when walking, running or

biking outdoors (although masks are still recommended outdoors for large gatherings where social distancing is not possible). Further, those who have been fully vaccinated may gather indoors or outdoors without masks, provided the gathering includes only members of one household or "bubble" and there is six feet or more space between household groups. This will apply to use of association amenities such as clubhouses and pool decks.

Associations might be inclined to implement vaccine requirements or to require proof of vaccine in order to participate in certain association activities. However, we advise against such rules. Association boards should not be in the business of monitoring vaccine status of residents, nor should they take on the responsibility of requiring proof of vaccine. There are a couple of reasons for this. First, boards should be cautious of taking on responsibilities they do not otherwise have under their governing documents, as it could lead to liability. If the Board announces that it will require that residents be vaccinated to participate in certain events, and that it will require proof of vaccinated status, individuals participating in those activities could reasonably believe that the board is taking steps to ensure the safety of the event. This could become a problem for the board if there did end up being an outbreak at an association event or someone became ill by using the amenities. A second consideration is that requiring proof of vaccination status will create anger and tension within the community. At this point, every adult who wants to get vaccinated can get vaccinated. Soon, Illinois will reach the point where those who have not been vaccinated have made the conscious decision to avoid the vaccine. As we have all seen with the wearing of masks, unfortunately, this has become a very heated political issue that boards are best avoiding.

Gatherings of Vaccinated People: The City of Chicago and other municipalities have stated that fully vaccinated people will not count against capacity limits that remain in place. While boards may allow larger gatherings of vaccinated people in light of this, boards should not be the ones to monitor vaccination status. Rather, the resident hosting the event in the association's clubhouse, pool or other amenity should – when making the reservation – attest that he or she will be responsible for confirming vaccination status. If, for example, an association's clubhouse is available for reservation for private events, the person reserving the space should be made to certify either that attendees are vaccinated or that reduced capacity limits will be observed.

What Remains Unchanged: Associations should continue to post reminders about capacity limitations, staying home if you are ill, and using masks. Boards should still consider requiring waivers for amenity use, and enhanced cleaning and sanitation practices should continue.

-

MAXIMIZING AN ASSOCIATION'S ABILITY TO COLLECT ASSESSMENTS: What should a common interest community association do when a unit owner files for bankruptcy protection?

The pandemic has had, and continues to affect the finances for many people. Many have lost jobs or seen a decline in their income. This has caused many common interest community associations to take a step back and re-evaluate their collection policies. Many remember what it was like for associations in 2007 and want to be proactive so as to minimize a negative financial impact on the association. Often, we talk about sending demand letters and proceeding with eviction actions to collect the unpaid assessments. Yet, there are steps that a

community association can also take to maximize what is due from an owner who files for bankruptcy protection. (And no, it is not true that when an owner files for bankruptcy, the association cannot collect any of the amount due to it!)

Upon receipt of notice that a unit owner has filed for bankruptcy protection, the association should immediately stop any and all collection activity and threats of collection action. When a unit owner files for bankruptcy, an automatic stay against collection begins pursuant to 11 USC §362. This means that an association may not proceed with or threaten any collection action against a unit owner who has filed a bankruptcy. An association can continue to send account statements to a unit owner that is in bankruptcy to notify the unit owner of the account balance. However, in doing so, an association cannot request payment or threaten any collection action. It is crucial that when an association is notified of a bankruptcy, the association, its manager, and counsel, immediately put an end to any collection activity and any threats of collection action. An association that violates the automatic stay can be heavily sanctioned (fined) by the Bankruptcy Court. The association should forward any notices it receives from the bankruptcy court to its legal counsel. Notifying counsel will help to ensure that the association does not violate the automatic stay against collection. Legal counsel can also ensure that the association does not forfeit any remedies and/or rights it has within the bankruptcy matter. A community association can be sanctioned for violating the automatic stay against collection.

Individual unit owners are considered consumers and referred to as debtors, once they file for bankruptcy protection. Community associations are considered secured creditors of the debtor. Debtors can file for bankruptcy protection under Chapter 7 or Chapter 13 of the U.S. Bankruptcy Code. A Chapter 7 bankruptcy is commonly referred to as a "liquidation" bankruptcy. Although this is somewhat misleading, as a Chapter 7 debtor very often does not have any unexempt assets to be liquidated. This means that in a typical Chapter 7 bankruptcy, there are no funds available to pay the debtor's creditors. The typical Chapter 7 bankruptcy lasts approximately four months and typically ends with a discharge of debts. The discharge extinguishes the debtor's *personal* responsibility for the debt that existed on the date the bankruptcy was file. In other words, once an order of discharge is entered, a creditor cannot go after the debtor's personal assets to payoff that debt. However, when an order of discharge is entered it does not have any impact on the association's lien against the unit within the association. For this reason, upon receipt of notice that an order of discharge was entered and that the Chapter 7 bankruptcy has concluded, an association should record a notice of its lien for the amount that was discharged by the bankruptcy court. For example, Jane Doe files a Chapter 7 bankruptcy. At the time that she files, Jane owes the ABC Condominium Association $3,200. The bankruptcy court enters an order of discharge in Jane's case. This means that since Jane owed $3,200 at the time of her bankruptcy filing, her debt of $3,200 is now discharged. The ABC Condominium Association cannot file a lawsuit to obtain a judgment against Jane personally for the $3,200. However, the ABC Condominium Association can record a lien against Jane's unit for $3,200. This lien will need to be satisfied to be released from the property, prior to Jane refinancing or selling her Unit. Of course, Jane can decide to pay it before she transfers title. In addition, the ABC Condominium Association can decide to

foreclose on that lien too.

It is also important for an association to provide its legal counsel with notice of any order of discharge entered in an owner's bankruptcy case. Failure to comply with an order of discharge can also result in the association be sanctioned by the bankruptcy court.

It should be noted that when a unit owner files for Chapter 7 bankruptcy protection, the unit owner remains personally responsible for paying all assessments and charges due to the association that accrued after the date of the bankruptcy was filed. These amounts also remain due to the association even if the owner obtains an order of discharge from the bankruptcy court.

A unit owner may also file for bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code. This is commonly referred to as a "restructuring" bankruptcy. A Chapter 13 bankruptcy can last three to five years. In a Chapter 13 bankruptcy, the unit owner makes monthly payments to a trustee, who distributes those payments to creditors pursuant to a Chapter 13 Plan. The Trustee's payments are intended to make a payment to the creditor each month to be applied towards the the amount that came due and owing prior to the debtor filing bankruptcy. In order to receive payments from the Trustee, an association who is owed money from the debtor must file a Proof of Claim. The Trustee will determine how much can be paid to each creditor, based on the amounts identified in the Proof of Claim. Before the Trustee can make such payments, the Bankruptcy Court must confirm the debtor's proposed plan to restructure.

Like a debtor who files for Chapter 7 bankruptcy protection, a unit owner who files under Chapter 13 remains personally responsible for paying the assessments that are due and owing after the bankruptcy is filed. Therefore, the debtor should continue to make their regular assessment payments, even while he is involved in a pending bankruptcy. These are often referred to as post-petition assessments. If the unit owner falls behind on payments of the post-petition assessments, the association should advise its legal counsel, as steps can be taken to collect these amounts. Often, it is enough for counsel for the association to send correspondence to the unit owner's attorney and/or file a motion within the bankruptcy proceedings to encourage payment.

There are times when a bankruptcy prevents an association from proceeding with collection efforts against an owner who has not filed a bankruptcy. This can happen in a Chapter 13 case if one or more, but not all of the owners, files for bankruptcy protection. The most common example of this is when a husband and wife own a unit together, and the husband files a bankruptcy, but the wife does not file. This situation is referred to as a co-debtor stay. This means, that a unit owner who has not filed bankruptcy may be protected by a bankruptcy filing.

Like a Chapter 7, a Chapter 13 bankruptcy can also end with a discharge of debts. The discharge extinguishes the personal responsibility for the debt that existed on the date the bankruptcy was filed. With a Chapter 13 bankruptcy, an association's lien is often satisfied with the payments received from the trustee during the bankruptcy.

It should be noted that in either case, Chapter 7 or Chapter 13, prior to an order of discharge being entered, the case can be dismissed. If an order of dismissal is entered, an

association can then proceed with collection even personally against the debtor and the automatic stay on collecting the debt no longer exists. Further, in either case, there may be a basis for the association to ask the court to lift the automatic stay and allow it to resume with collection proceedings against the debtor. The facts and circumstances of the case will govern whether such a motion can be filed. Consultation with legal counsel will help the association determine if this is an option available to the association.

Finally, regardless of what chapter an owner files for bankruptcy protection, at the time the bankruptcy is filed, it is recommended that the association assessment account be split into two accounts, i.e., a "pre-petition" account and a "post-petition" account. The pre-petition account will include the amounts that came due on or before the date the bankruptcy was filed, plus any legal fees related to the bankruptcy, should be charged to the pre-petition account. The post-petition account should be for assessments and other common expenses that accrue after the date the bankruptcy was filed. As payments are received, it is important that payments are posted to the correct account for the debtor.

As you can see, when an owner files for bankruptcy there are still ways for the association to collect the amounts due and owing to it. To maximize the amount to be collected, the association should seek advice from legal counsel as to what can and should be done when an owner files for bankruptcy protection. This will hopefully alleviate the confusion that can be created when notice is received.

If you have any questions about this article or anything else related to your association, please do not hesitate to contact our office.

Chuck Keough (cmk@kmlegal.com**), Dawn Moody (**dlm@kmlegal.com**),**
and Gabby Comstock (grc@kmlegal.com**)**

Write Keough & Moody a Review!

Google My Business (GMB)
http://bit.ly/2m830Py

Facebook

Naperville
630-369-2700

Chicago
312-899-9989

Tinley Park
630-369-2700

www.kmlegal.com
info@kmlegal.com

STAY CONNECTED

Share Share

Keough & Moody, P.C.,
114 East Van Buren, Naperville, IL 60540