In 1993, the Massachusetts legislature by act signed by the governor with an emergency preamble granted condominiums a limited priority lien ahead of the first mortgage, in part, to force lenders to take action when they had previously failed to act. This failure to act when lenders had the priority over associations was the cause of financial distress to associations that were not collecting sufficient common fees from delinquents. However, this great tool that levels the playing field is always under attack (1) from lenders who oppose more than one priority lien period in any 30-year mortgage and (2) unit owners who are in financial distress.

Along comes bankruptcy. The basic principle is to give a person without hope financially, a second chance. Therefore, when one decides that there is no way to make ends meet, that person may file a request for relief from the bankruptcy court.

As soon as a filing is made, as a matter of law, even if you do not yet know of the filing, the entire world is enjoined from taking any action against the debtor. This injunction is referred to as the “automatic stay.” Without first requesting relief from the automatic stay from the bankruptcy court, one cannot take any action against the debtor without being in contempt of court. Such relief is usually not granted until after there have been filings by the debtor and hearings wherein the debtor is examined by creditors. Therefore, there is a period of time, sometimes a considerable period of time within which creditors are not allowed to take any action, to their frustration and where the debt may continue to rise.

**Chapter 7 vs. Chapter 13**

The typical debtor usually asks for protection under either Chapter 7 (liquidation) or Chapter 13 (reorganization — formerly called a wage earners plan).

Under Chapter 7, all assets and liabilities are presented to the court and after the exclusion of certain assets which by law are exempt; the remaining assets if any are liquidated and paid in accordance with certain priorities. For example, secured creditors (including condominium lien holders) are paid first to the extent that there are assets. Sometimes secured creditors do not get paid in full but only receive a percentage, frequently a small percentage, of what is owed and have to seek other ways to recoup their money. Typically that is what causes secured creditors to foreclose on their security interests in the asset.

In Chapter 7 and Chapter 13, if the unit is kept by the debtor who continues in occupancy, the debtor is required to pay in their entirety the post-petition common fees due after the filing for protection. If these fees are not paid, the court will almost always allow the association to proceed with lien enforcement for that new debt as well as the prior debt.

In a Chapter 13, the debtor must file a plan showing how the debtor intends to pay back the pre-petition debt incurred before the filing of the petition in bankruptcy, usually over a three- to five-year period.

In either situation, innocent unit owners are going to have to take up the slack. Further, bankruptcy judges, in their efforts to assist debtors, may substantially reduce legal fees, etc. Savvy debtors can extend the suffering by filing for protection in order to stop the creditor from taking
action on the night before or even the day a foreclosure is scheduled. Having taken advantage of the automatic stay, they can then dismiss their bankruptcy petition at a later date. Once action is again undertaken by the creditor, the debtor might file a new petition, creating a new automatic stay. This can go on repeatedly without the court taking action against the debtor until it appears to the court as though the debtor is using the request for relief as a subterfuge, not to get relief afforded by the court but rather to vex creditors. The court may then issue orders that will stop this. In the interim, months and perhaps in excess of a year can pass while the association has to go to innocent owners to pay the freight of a deadbeat owner.

In its attempt to give the debtor a second chance, bankruptcy court procedures hurt unit owners who may be trying to make ends meet themselves without also seeking bankruptcy protection. This is the conundrum.

**Lender Role and Authority**

Statutory lien enforcement, especially when successive lien enforcement actions are instituted against a unit, its owner and its lender are important tools to rectify any injustice.

Bankruptcy courts need to use their powers to assist. It is not merely the debtor in distress who is on the hook that has the obligation to pay outstanding common fees, but also the deep pockets of the bank, which can add unpaid common fees to the outstanding loan debt that should be accessed. The lender should pay the defaulting owner’s common fees. If it doesn’t, the court ought to strip it of any priority it has ahead of the association receiving its funds. Then the lender could maintain its position as a secured creditor while taking the condominium and its innocent owners out of the bankruptcy proceeding.

The authority for this is contained both in the bank’s mortgage and in Massachusetts G. L. c. 183A §6 wherein the bank has the right to avoid further lien action by agreeing to pay common fees going forward.

At some point in the proceedings, if it appears that the association is not going to be made whole, or if the owner does not pay going forward, the association can move for relief from the automatic stay and attempt to proceed to enforce its statutory lien in state court with the permission of the bankruptcy court.

By that time, however, much time may have passed and the association may have lost substantial sums if it did not keep on top of the situation to protect its priority.

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