



# Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

**MAY 2017**

## FEATURE

*One wrong move could mean a financial penalty costing more than the debt you're owed.*

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## Take Proper Steps When a Member Declares Bankruptcy

*By Andrea Brescia*

With almost 800,000 bankruptcy filings in 2016 alone, chances are that someone living in your community will declare bankruptcy at some point. And the likelihood grows if your association is in the South, where the highest numbers of bankruptcies are recorded. With one filing, the member living in your community goes by the new name of “debtor” on official documents. And just like that, the way you deal with this member must shift dramatically.

Individuals, not companies, make up the majority of bankruptcy filings each year. Once filed, the person—or debtor—immediately comes under the protection of federal bankruptcy law, giving him some breathing room from creditors and time to come up with a plan to address his debt. But for the creditor—that is, the person or organization that’s owed money—this is a crucial time. One wrong move could mean a financial penalty costing more than the debt itself in some cases.

What this means for the creditor—that is, the association—is that bankruptcy changes everything. Once a member who’s in arrears on his assessments files for bankruptcy you must immediately stop trying to collect the debt owed to you or risk heavy penalties from the court.

But then what? What can and should you do? What happens if you have a pending lawsuit against the member, or if you’ve been sending delinquency letters? Will you ever be able to collect what’s due?

We’ll give you a crash course in Bankruptcy 101 and tell you the exact steps to take—including the most important first step—to protect the association and avoid what could be a very costly misstep if you violate the court’s protection of the debtor.

### Bankruptcy Stops Any Action

When a person files for a bankruptcy, the court immediately issues an “automatic stay.” This is a big protection of bankruptcy because the automatic stay prohibits any creditor or individual from attempting

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## Member Bankruptcy

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to collect on a debt or take any action to collect that debt as of the date of the bankruptcy, says North Carolina attorney Michael Taliercio.

As of the date of the bankruptcy filing, the association cannot enforce its rights to collect past-due fees. You can no longer send letters, pursue lawsuits, or make any attempt to collect on the debt. Keep in mind that the principal purpose of the Bankruptcy Code is to grant a “fresh start” to what’s commonly referred to as the “honest but unfortunate debtor.” That means that you have to be very cautious in how you proceed. The bankruptcy courts exist to help debtors reorganize their lives. Because of this, the courts do not look favorably on creditors who try to collect—or violate the automatic stay—on a debt. A violation of the bankruptcy law, or the automatic stay, can have very serious financial consequences. In many cases, the penalties will be far greater than what the member actually owes in outstanding fees.

If one of your members is in arrears with the association, you must follow these guidelines as soon as the bankruptcy is announced since the automatic stay is in effect as of the date of the bankruptcy filing—and stays in place until the court sets it aside or until the proceedings end.

### Take Each of the Following Steps Immediately

The court will notify you that you’ve been named as a creditor in a bankruptcy. As soon as you receive this notice, follow these steps:

**1. Notify your attorney.** It’s essential to have someone who’s familiar with bankruptcy law review the bankruptcy notice. Bankruptcy is a complex area that’s

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## Member Bankruptcy

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ruled not only at the federal level, but varies by state and district. Adding to that, no two bankruptcy cases are the same; many issues arise on a case-by-case basis. An attorney will review the case and understand significant details in the filing that will help guide the best course of action. The notice that you receive will be titled, “Order for Meeting of Creditors Combined with Notice Thereof and Automatic Stay.” It will provide you and your attorney basic information on the bankruptcy proceeding, including the case number, filing date, date of the first meeting of creditors, and a general statement of the debtor’s assets and liabilities.

**2. File a claim.** If payments to creditors will be made in the case, then your attorney must also file a proof of claim with the bankruptcy court in order to collect anything on the debt. A proof of claim documents and preserves your claim for unpaid assessments and other debts against the member. This claim must be filed in a timely manner. If not, it may not be considered at all.

Further, claims are ranked by priority in the bankruptcy process. All the claims within the same class get the same treatment by the bankruptcy court. So, for example, unpaid federal taxes get a higher priority than unpaid credit card claims. That means sometimes even if payments are made in a case, the higher priority creditors might get all the money.

Unfortunately, says Taliercio, “an HOA is not typically a large creditor, and the court is trying to rule in the best interest of the debtor and all the creditors.” Bankruptcy courts usually pay most attention to the larger creditors, he says. “Usually, people in bankruptcy owe tens of thousands of dollars to their creditors. A debt for outstanding homeowner dues is probably not going to be nearly as much as many of the person’s other debts, so the bankruptcy court is probably not going to prioritize the interests of the HOA if there’s a disagreement between creditors and the person in bankruptcy over how payments will be distributed,” Taliercio warns.

You must also consider the cost effectiveness for you in fighting to get paid in a bankruptcy. For example, if you’re owed \$1,000 in member fees, but you have to pay \$4,000 in attorney fees to file a motion in bankruptcy court to get paid, that doesn’t make a lot of financial sense, Taliercio cautions. Still, filing a proof of claim puts you in line.

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**PRACTICAL POINTER:** When the proof of claim needs to be filed depends on the type of bankruptcy case, such as if the case is Chapter 7 (liquidation bankruptcy) or Chapter 13 (consumer reorganization bankruptcy). Your attorney will be able to inform you of the filing deadlines and how the procedures differ.

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**3. Immediately stop any lawsuits.** If you have a lawsuit pending against the member or are about to file one, immediately put everything on hold. Continuing to pursue a lawsuit or filing a new one after the bankruptcy has been filed is a violation of the automatic stay and carries steep penalties.

**4. Stop sending collection letters and other correspondence.** “Stop taking any action against the debtor and see what you’re allowed to do,” says Taliercio. This means stop any demands for unpaid assessments, fines, or any other fees.

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Don't send letters, make calls, or file a lien against a member in arrears once he has filed for bankruptcy. All of these things would be a violation of the stay imposed by the bankruptcy court.

**5. Notify collection agencies.** If you've been using a collection agency on the HOA's behalf to collect the debt, you must immediately notify it to stop all further attempts or communications to contact the member. This goes for anyone else who might be working on the HOA's behalf to collect on the debt.

### Financial Consequence of Violating Automatic Stay

Violating an automatic stay is a serious offense. "It's not something that the bankruptcy court will be particularly sympathetic toward the creditor on," says Taliercio, adding, "The automatic stay is one of the pillars of bankruptcy protection."

It's also a powerful defense for bankrupt members. Associations that knowingly violate it—for example, by even *threatening* to sue—are subject to stiff penalties, including:

- The legal fees and court costs of the member;
- Damages to compensate the member for actual losses (including pain and suffering); and
- Punitive damages.

In addition, do not continue to pursue the debt once the bankruptcy has been discharged. The discharge injunction forbids creditors from attempting to collect debts that were discharged through the bankruptcy.

### Don't Deny Services to the Member

You also don't want to do anything that might be perceived as a violation of the automatic stay. That goes for denying the member in arrears access to community services. Taliercio cautions that denying services and amenities to the member is likely going to be viewed by the bankruptcy court as an attempt to collect the debt.

"It's a roundabout way of saying you need to pay your dues from last year," he says, underscoring that the association, as of the day the bankruptcy is filed, needs to start treating that person as if she were current on her dues.

### Set Up Pre- and Post-Bankruptcy Accounts

Since the date the member has filed for bankruptcy stops all pursuit of the debt owed up to that date, immediately set up a new account for the member to reflect assessments and fees incurred after that date. This is a very important distinction to make because while you are prohibited from approaching the member for any outstanding debts before the date of the bankruptcy filing, the member is responsible to pay assessments and fees beginning the day after the bankruptcy filing. Only debt before the date of filing is considered protected.

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Any assessments that the member incurs after the bankruptcy filing date must be paid to the association. Therefore, you are allowed to approach the member to collect on fees after the bankruptcy filing.

Setting up two different accounts and file systems will help you stay in compliance with the bankruptcy while also attending to all post-bankruptcy assessments, fees, and even fines the member may incur for damages to his unit. The way that you'll handle both of these accounts will differ greatly, with the first largely being handled by your attorney and the second, business as usual. ♦

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## Bankruptcy by the Numbers

### ♦ States with the highest bankruptcy rates

- |              |                |
|--------------|----------------|
| 1. Tennessee | 6. Indiana     |
| 2. Alabama   | 7. Mississippi |
| 3. Georgia   | 8. Kentucky    |
| 4. Illinois  | 9. Arkansas    |
| 5. Utah      | 10. Ohio       |

Source: [www.csmonitor.com/Business/Saving-Money/2016/0816/The-South-has-the-highest-bankruptcy-rates-in-the-country](http://www.csmonitor.com/Business/Saving-Money/2016/0816/The-South-has-the-highest-bankruptcy-rates-in-the-country)

### ♦ Individuals are responsible for the highest number of bankruptcy filings, with Chapter 7 and Chapter 13 the most commonly filed.

### ♦ 2016: Business & Non-Business Filings

BUSINESS	NON-BUSINESS	TOTAL
25,227	793,932	819,159

### ♦ 2016: Total Bankruptcy Filings by Chapter

CHAPTER 7	CHAPTER 11	CHAPTER 12	CHAPTER 13
509,769	7,928	459	300,858

Source: [www.uscourts.gov/news/2016/07/27/june-2016-bankruptcy-filings-down-69-percent](http://www.uscourts.gov/news/2016/07/27/june-2016-bankruptcy-filings-down-69-percent)

## RECENT COURT RULINGS

### ► Do Community's Rules Discriminate Against Families with Children?

**FACTS:** A couple filed a fair housing case, alleging discrimination based on familial status at the condominium community where they lived with their two minor children. The couple claimed that the condo association and its management company created an “atmosphere of hostility” against families with children.

Among other things, the couple alleged discrimination and harassment at the community stemming from problems with their downstairs neighbor, who repeatedly complained about noise caused by the children. The couple claimed that they received numerous write-ups and verbal warnings because of her complaints, but the community didn't do anything to reprimand the neighbor, who they said displayed physical and verbal aggression toward them and their children.

The couple also accused the community of posting discriminatory signs and imposing rules that targeted families with children and limited or prohibited their full and equal use of the property. Specifically, the couple pointed to signs and rules that:

- Prohibited access to the gym for children under the age of 7;
- Required adult supervision in the gym for children between the ages of 7 and 14;
- Prohibited the use of bicycles, roller skates, inline skates, skateboards, and scooters on the property;
- Required adult supervision of children under 14 who use the pool or spa;
- Required children in diapers to wear rubber pants and a bathing suit;
- Prohibited beach balls, rafts, and toys in the pool and spa area;
- Prohibited pool parties; and
- Prohibited playing in any part of the common area.

In pretrial proceedings, the couple asked the court for a court order to prevent the community from enforcing the allegedly discriminatory rules, until the case could be resolved at trial. At the hearing, however, the couple narrowed their request to cover only the community's “play rule,” which provided that:

No one is permitted to play in any part of the common area, such as: halls, landings, storage areas, corridors, driveways, roofs, lobbies, ramps, streets, elevators, parking areas, stairways, garage gates, planted areas, trees, and lounge. This rule is not child specific.

**DECISION:** A California court denied the couple's request, but allowed the case to proceed.

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## Recent Court Rulings

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**REASONING:** In a pretrial ruling, the court denied the couple's request for an order to prevent the community from enforcing the no-play rule. Though the court ruled against the couple at this point in the litigation, further proceedings will be needed to resolve the couple's allegations against the community.

When deciding whether to grant the couple's request, the court had to weigh several factors, including whether they were likely to succeed on their claim that the community's signs and rules discriminated against families with children.

Ruling against the couple, the court said it was unlikely to conclude that the community's rules discriminated against families with children. Unlike other cases involving discriminatory rules, the rules at this community did not confine children into certain areas or restrict access to facilities based on residents' familial status. For example, the community didn't have a general rule requiring adult supervision of children in common areas, or impose unreasonable limits on children while using the pool or other amenities.

Although its gym and pool rules specifically identified children as presenting special concerns, the community did so for reasons of safety. The couple failed to show that those rules were too restrictive or that the community's safety concerns were merely an excuse to cover up unlawful discrimination. For example, the pool rule didn't bar children from using the pool at certain times and didn't apply to children over the age of 14. Instead, the pool rule complied with state regulations, which requires a sign that children under 14 should not use the pool without adult supervision.

With respect to the play rule, the couple argued that it prohibited children from being anywhere on the community's property other than inside a unit, but the community pointed out that the play rule wasn't child specific. The court agreed that the play rule wasn't specific to children and therefore, interpreted the rule to impose limits where there appears to be a risk of injury to residents or their guests.

- Barkhordar v. Century Park Place Condominium Assoc., October 2016

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**LESSONS LEARNED:** Communities may enforce reasonable rules to ensure the peaceful enjoyment of the premises, but it's important to make sure that the rules don't impose unfair restrictions on families with children. Rules restricting behavior in common areas could lead to a discrimination claim if the rules target children or unreasonably limit their behavior. Rules banning children from playing outside—or requiring adult supervision of children in common areas—could lead to accusations that you are treating families with children less favorably than adult households living at the community. ♦

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## DEALING WITH MEMBERS

### Use Social Media to Reach—and Listen to—Your Community

By *Andrea Brescia*

More and more Americans are getting—and sending—their information through social media in real time: from politics and breaking news to sharing family photos and learning about events. Platforms like Facebook and Twitter are the favored community forums for staying in the know. Facebook pages, Twitter streams, and even community-designed apps are popping up all over homeowners associations—sometimes both officially and unofficially.

With such a powerful platform at your fingers as well as those of your members, how can you best use social media to your advantage to build and protect your brand? How should you monitor the open comments sections? Can you be held liable for a user's comments?

We'll give you some guidelines on how to maximize the conversations that are taking place both on your official social media pages and in member-created online community forums so that you can manage the messaging while responding to the pulse of your community. Also, we'll tell you how to safely create a powerful marketing tool by using and monitoring your members' comments.

#### Nine Ways to Manage the Message

While more casual than other forms of marketing, social media is a powerful marketing tool and each post counts. As such, your messages should be carefully crafted—and planned—as part of your overall marketing strategy. “We regularly schedule a blast every week for our events department, and we plan Facebook posts as part of our normal communication,” says Wendy Taylor at South Riding Propriety, an association in Virginia with over 6,000 homes.

Here are nine ways to help you manage your social media strategy:

❑ **Assign point people to monitor sites.** South Riding has a social media policy in place and assigns several people to consistently monitor their sites. “Only a few people can post on our Facebook page,” she says. “We try to centralize it with two of our staff members so that we are controlling the marketing message.”

Similarly, Tammy McAdory at Kiawah Island Community Association also uses a communications staff of two people, with one staff member designated as the primary point person and the other a backup. Both monitor the comments sections and keep information fresh, interesting, and up to date.

❑ **Avoid legal and ethical risks.** “Managing a social media site is relatively low risk,” says McAdory. “The Federal Communications Decency Act provides

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## Dealing with Members

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protections against a range of laws that might otherwise be used to hold us, as host, responsible for what others post.” (See box “*Federal Law Allows Blocking of Offensive Material Online.*”) Her staff is also careful not to use ads or banners, to avoid being seen as recommending a particular service or provider. She further cautions that copyright issues are probably the most common pitfall, so her team publishes only those photos and videos that either the association has taken or has permission from the source to use.

**☐ Monitor and remove inappropriate comments.** A lot of discussion takes place in open comments sections and Facebook posts. While social media sites can reinforce positive images of the community, members might also use the sites to express frustration or just vent. Again, make sure to appoint designated staff to monitor the comments daily and charge them with removing or hiding negative or inappropriate comments.

“We will hide personal comments or offensive language,” says Taylor, adding that they will address the personal comments that they hide one-on-one. “For example, if someone is venting over a community standards issue, then that department would reach out to the member directly,” she says. “But we don’t do it through Facebook.”

McAdory agrees. She says that they trust their members to behave appropriately, but when they don’t, they immediately remove the posts. “We won’t allow personal attacks,” she says.

At the same time, McAdory says that they don’t respond online to grievances because responses wouldn’t reach all of their members. “Official communications are published in our printed monthly newsletter and/or our weekly e-news, which are sent to all members,” she says. Knowing what percentage of your membership is online can help you decide when you need to use print, mail, and more formal methods to reach everyone—and help you craft an effective way to integrate social media into your marketing plan.

**☐ Listen in on community-created Facebook sites.** While not official, Facebook pages that have been created by your members to get to know each other, share non-official community news and events, swap advice, etc. can be a powerful tool to help you get to know the issues and concerns of your members. At South Riding, Taylor says that rarely they need to remove a post on their official page, because the members have created a community page that parallels the official HOA page. Because the association is so big, the members created their own site to post things regarding, say, hiring a babysitter, finding a restaurant recommendation, and other community networking. Taylor says this is the site where people usually vent.

“We monitor it,” she says, “to know what issues are out there.” The complaints usually involve misinformation, she says, so her staff will try to direct members to the association’s official page where the correct information will be posted. Sometimes, they will even ask certain members to post the correct information on the unofficial page or to try to direct users to the official page.

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## Dealing with Members

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❑ **Avoid creating sites and pages that you don't use.** A dormant site reflects poorly on the association and unmonitored and uncensored comments can quickly become an issue. "It's not enough to be on it; you have to continually engage," says McAdory, adding that similarly, over-posting can be detrimental as well. You must find the right balance for your membership.

❑ **Use social media to build the association's brand.** "Social media are additional channels that help us maintain a consistent voice, and to reach segments of our owners who prefer social media communications," says McAdory, adding that the voice of social media is more personable and human. "It removes some of the 'big business' aspects of what we do and humanizes the association to its members, many of whom never come into personal contact with operations," McAdory says. "This translates to trust and credibility because we want to provide as many methods for members to reach us as possible—and we want to be repetitive."

McAdory also acknowledges the wisdom of the old marketing "Rule of Seven," using Instagram, multiple Facebook pages (for special events, etc.), mobile apps, and text messages to reach members multiple times using multiple platforms to

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### ► **Federal Law Allows Blocking of Offensive Material Online**

The Federal Communications Decency Act provides protection to social media providers for comments posted by readers under the following section:

#### **§230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL**

##### **(c) Protection for "Good Samaritan" blocking and screening of offensive material**

###### **(1) Treatment of publisher or speaker**

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

###### **(2) Civil liability**

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

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## Dealing with Members

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share the message. Unlike other forms of marketing, you can reach members and convey information in a casual voice. But although you're using an informal tone, make it consistent, she advises.

❑ **Help your seniors and older adults get online.** According to the Pew Center for Research, the use of social media among those 65 and older has tripled since 2010, when only 11 percent were on social media sites. Today, 35 percent of people older than 65 are using social media—meaning the seniors in your community are getting on the tech bandwagon.

“Our goal is to continually grow social media, helping our often older demographic to get comfortable with it,” says McAdory. To do this, she says, her staff posts appealing (or sometimes controversial) information. Additionally, since 80 percent of the association's members are not there full time, they find photos to be a very compelling way to engage them.

❑ **Use caution before promoting non-sanctioned association events or news.** Think twice before publishing information that might be seen as outside of official association business. It's important to use social media activity as you would any other form of marketing for the community. You don't want to appear to show favoritism or that you're endorsing non-official association events or news. Taylor says her staff doesn't post anything non-sanctioned on their sites with the occasional exception of county-driven news that impacts the community's core mission or values, such as county meetings or findings.

❑ **Consider the benefits of an app.** South Riding developed an app that it also uses to push information. To encourage members to download and use it, they built in functionality so that members can access the popular pool facilities—including the high-in-demand water parks—using the app. “People are always losing pool passes,” says Taylor. With the app, she says, they can gain access, reserve guest passes, and centralize the access. ♦

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