

A Reminder for Borrowers: Post-Discharge Communications by Creditor Must Coerce or Harass in Order to Violate Bankruptcy Law

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In *Kirby v. 21 Mortg. Corp.*, the First Circuit Bankruptcy Appellate Panel examined the Kirbys' claim that the 19 written communications they received from their mortgage holder following their Chapter 7 discharge violated the Bankruptcy Code [524\(a\)\(2\)](#)'s injunction. The Kirbys further claimed bankruptcy discharge violations arising from their mortgage holder's delivery of an escrow account disclosure, short sale letter, cash-for-keys letter, and right to cure notice for a total of 26 post-discharge bankruptcy communications. Below, we take a closer look at the decision and its comprehensive review of bankruptcy discharge law along with the process for determining whether a post-discharge correspondence violates the bankruptcy code's injunction.

After the bankruptcy court granted the Kirbys a discharge of all debts on December 4, 2014—including the underlying mortgage debt—the mortgage holder sent the Kirbys eight letters regarding their request for a loan modification, nine monthly statements, an ARM notice and PMI notice.

On review of all communications, the bankruptcy court granted the mortgage holder summary judgment by concluding that each document adequately informed the Kirbys that the mortgage holder was not attempting to collect a debt or hold the recipient personally responsible for the debt if the recipient was discharged in bankruptcy. The bankruptcy court also found compelling evidence that the mortgage holder delivered correspondences to the Kirbys' counsel during the course of post-discharge loan modification negotiations, that the mortgage holder responded to the Kirbys' cease and desist letter by halting all communications, and that the Kirbys' counsel did not send the cease and desist letter until after loan modification negotiations broke down. According to the bankruptcy court, "the vast majority of the written communications...were sent to Mr. Kirby's bankruptcy counsel and given the context of those communications they do not objectively constitute coercive or harassing actions in violation of the protections of the discharge injunction."

The First Circuit's Bankruptcy Panel affirmed on appeal while discussing three separate elements of a discharge injunction claim critical to the review:

1. The borrower/former debtor must establish the creditor's violation of the discharge injunction by clear and convincing evidence.
2. The discharge injunction does not prohibit every communication between creditor and debtor—only those designed to collect, recover or offset any discharged debt as a personal liability of the former debtor. In other words, correspondence that is informational in nature does not violate the discharge injunction or the automatic stay.
3. Review of correspondences for discharge violations is a particularly fact intensive inquiry, but the common factor is a “clear demand for payment of a pre-petition debt accompanied by coercion in the form of a threatened action or some other consequence for nonpayment, or harassment to induce the debtor to pay.” Courts look beyond the particular content of communications and consider whether circumstances and context in which the creditor sent the communications give rise to an inference of coercion.

The Kirby communications did not demonstrate clear and convincing evidence of coercion or harassment. In the opinion of the Panel, the mediation communications were sent to the Kirbys' counsel and within the context of the parties' extensive efforts to modify the loan as a resolution of the mortgage prior to foreclosure. Moreover, all post-discharge communications, particularly those sent after the mediation effort concluded, included disclaimer language, were demonstrably informational, and were part of the judicial foreclosure process that the mortgage holder was required to pursue notwithstanding the bankruptcy court's discharge of the underlying debt. Ultimately, the court could not conclude that any of the post-discharge communications, individually or collectively, coerced or harassed the Kirbys to pay a discharged debt.

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