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Lender Cleared of Bankruptcy Discharge Violation

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A lender which sent nearly two dozen letters to a borrower after a bankruptcy discharge did not violate the discharge injunction. This comes in a recent ruling from the Bankruptcy Court in Maine. In re Kirby, 2018 WL 3197750 (Bankr. D. Me. Jun. 26, 2018).

The borrower complained that the lender repeatedly sent mortgage statements, requests for mortgage assistance letters, adjustable rate adjustment notices, and a default letter post-discharge. To prove a discharge violation, a debtor must show the defendant (1) had notice of the discharge, (2) intended the actions which violated the discharge, and (3) acted in a way that improperly coerced or harassed the debtor.

In this case, the Bankruptcy Court found that while the lender had notice of the discharge and intended its actions, it did not improperly coerce or harass the debtor. It explained that the statements and letters included a bankruptcy disclaimer. The Court criticized the disclaimer for using "conditional" language ("mortgage statement is not a demand for payment or a notice of personal liability to any recipient who might have received a discharge"). Ultimately, however, the Court emphasized the fact the statements and letters were also sent to the borrower's attorney who could "easily have allayed any concerns his client may have had that these letters were collections efforts."

In re Kirby offers a couple of takeaways. First, lenders/loan servicers should consult the CFPB's bankruptcy disclaimer issued in connection with the latest revisions to Regulation X. Second, copying the borrower's counsel on post-discharge correspondence is helpful in the event of a dispute.

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