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Caren Enloe is a partner who concentrates her practice in consumer financial services litigation and compliance, bankruptcy, and commercial litigation with an emphasis on creditor's rights. She has a deep understanding of the complex compliance environment surrounding the financial services industry and regularly advises financial service companies on licensing and compliance issues involving state and federal consumer protection and finance statutes. Caren is the author of a daily blog titled: Consumer Financial Services Litigation and Compliance where she posts timely and informative updates regarding the CFPB, FTC, and a host of topical litigation issues involving consumer protection law.

First Circuit Affirms Bankruptcy Court's Judgment in Favor of Mortgage Company

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A First Circuit Bankruptcy Appellate Panel (the "Panel") recently held that a mortgage company's communications did not violate the discharge injunction when viewed under an objective standard and considering the facts and circumstances surrounding the communications. *Kirby v. 21st Mortg. Corp.*, 599 B.R. 427 (2019).

In *Kirby,* the consumers filed Chapter 7 while engaged in a state-sponsored Foreclosure Diversion Program. After the Kirbys received their discharge, the parties continued with the diversion program, including mediation. Post-discharge, but within the context of the mediation and other loss mitigation efforts, the mortgage company sent a series of communications to the Kirbys in care of their counsel. All but one of the documents contained a bankruptcy disclaimer informing the Kirbys that

> To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, a secured party retains rights under its security instrument, including the right to foreclose its lien.

Id. at 434. After all attempts at loss mitigation failed, the Kirbys' counsel sent a cease and desist notice to the mortgage company. After receipt of the cease and desist, the mortgage company sent an annual escrow account disclosure statement, a letter regarding a possible short sale as an alternative to foreclosure and a PMI Disclosure, all of which were addressed to the Kirbys in care of their counsel. The mortgage company additionally sent a Right to Cure directly to the Kirbys which contained a bankruptcy disclaimer. In total, the mortgage company sent 24 written communications to the Kirbys or their counsel in the 26-month period following the discharge.

Post foreclosure, the Kirbys reopened their bankruptcy and initiated an adversary proceeding alleging, in part, that the mortgage company's post-discharge communications were coercive attempts to collect a debt in violation of the discharge injunction. The bankruptcy court disagreed and granted summary judgment in favor of

the mortgage company.

On appeal, the issue before the court was whether the post-discharge communications improperly coerced or harassed the Kirbys into paying the discharged debt. While the Kirbys argued that the sheer volume of the communications amounted to coercion, even if the individual communications did not, the Panel did not agree and concluded that the surrounding circumstances and context in which the communications were sent eliminated any coercive or harassing effect of the post-discharge communications. *Id.* at 444.

In reaching its decision, the Panel noted that the discharge injunction does not prohibit every communication between a creditor and debtor—only those designed to collect, recover, or offset any discharged debt as a personal liability of the debtor. The court then examined the individual communications sent by the mortgage company. Regarding the letters sent during the mediation period, the Panel first observed that each of the communications was sent to the Kirbys' counsel and not directly to the Kirbys. Moreover, all but one of those communications included "unambiguous bankruptcy disclaimers informing Mr. Kirby that if he had received a bankruptcy discharge, 21st Mortgage was not attempting to collect a debt from him personally and the correspondence was for informational purposes only." *Id. at* 444. The communication which did not include the bankruptcy disclaimer was an ARM Notice which merely informed the Kirbys of a change in interest rate. With respect to the ARM Notice, the lack of a bankruptcy disclaimer did not concern the Panel and was not a *per se* violation of the discharge injunction because it was evident from the circumstances that there was no coercion or harassment. *Id.* Moreover, the Panel noted, when debtors initiate contact with a creditor to negotiate alternatives to foreclosure after post-discharge, certain communications from the creditor are logical and will not violate the discharge injunction. *Id.* at 445. The Panel also concluded that the post mediation communications were either sent for informational purposes or to enforce the Defendant's mortgage foreclosure rights and therefore did not violate the discharge injunction.

Based on the totality of the circumstances surrounding the post-discharge communications, together with the substance of those communications, the Court concluded that the correspondence in question, whether viewed individually or cumulatively, was not coercive or harassing and did not violate the discharge injunction. *Id.* at 448.

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